Beverly Health and Rehabilitation Services, Inc., its Operating Regional Offices, Wholly Owned Subsidiaries and Individual Facilities and each of them, and/or its Wholly Owned Subsidiary Beverly Enterprises-Pennsylvania, Inc., d/b/a Beverly Manor of Monroeville, et al. *and* District 1199P, Service Employees International Union, AFL–CIO, CLC. Case 6–CA–27873

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On May 1, 1997, Administrative Law Judge Robert T. Wallace issued an order bifurcating this proceeding and deferring litigation of remedial issues pending his determination of whether, and to what extent, the Respondent committed the unfair labor practices alleged in the General Counsel's complaint. On November 26, 1997, the judge issued his attached initial decision, finding that the Respondent had committed most of the unlawful actions alleged. Accordingly, the judge convened an additional evidentiary proceeding for the remedial phase of the trial.[1] On November 30, 1999, he issued his attached supplemental decision addressing the remedial issues.

In the first phase of the proceeding, the Respondent[2] filed exceptions and a supporting brief and the General Counsel filed limited exceptions and a supporting brief. The Respondent and the General Counsel each filed an answer to the other's exceptions, and the Respondent filed a reply to the General Counsel's answering brief. In the remedial phase, the Respondent filed additional exceptions and a supporting brief and the General Counsel filed additional limited exceptions and a supporting brief. The Respondent and the General Counsel each filed an answer, and the Respondent filed a reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions.[4]

1. We adopt the judge's finding that the Respondent violated Section 8(a)(1) when the administrator of its

[1] The judge included a recommended remedy in his initial decision, subject to the outcome of the remedial phase.

[2] As detailed in the background section of the judge's initial decision, the Respondent includes 20 nursing homes located in Pennsylvania and operated by Beverly Health and Rehabilitation Services, Inc. (Beverly). In his initial decision, the judge found that Beverly and its subsidiary Beverly Enterprises–Pennsylvania, Inc. (BE-P) shared responsibility for the Respondent's unfair labor practices. In his supplemental decision, however, the judge corrected himself and found that BE-P was "simply a shell through which reports are filed with Pennsylvania government authorities." The Respondent agrees in its brief that the distinction between Beverly and BE-P was merely "technical." Accordingly, the unlawful conduct attributed to both Beverly and BE-P in the judge's initial decision is instead attributed only to Beverly.

[3] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Consistent with the motion filed by the Respondent, we take administrative notice of the April 28, 1999, decision in *Beverly Health & Rehabilitation Services v. NLRB,* mem. 181 F.3d 99 (6th Cir. 1999), where the Sixth Circuit, in reviewing a bargaining order based on the Board's certification of a union in an underlying representation proceeding, held that the licensed practical nurses (LPNs) at Haida Manor were supervisors at the time relevant to the certification. (The relevant time period commenced in June 1997, when the union had filed the petition that initiated the representation proceeding.) We find, however, that that decision is not dispositive of the employee status of the LPNs for purposes of the issues presented in this case, even assuming that our order here is subsequently reviewed by the Sixth Circuit, rather than the Third Circuit, where the unfair labor practices arose. The events underlying the unfair labor practices found here all occurred on March 9, 1996, or earlier. Thus, we have had reason to consider the status of the LPNs based only on their duties and authority during that period, some 15 months before the petition was filed in the representation case reviewed by the Sixth Circuit. We had no occasion to consider any subsequent developments that affected their status during the period considered by the court. Accordingly, while we regard the Sixth Circuit's decision as the law of that case, binding on us as to the later certification, we do not find it dispositive here.

Finally, in affirming the judge's finding that the Haida Manor LPNs are not supervisors, we have also considered the Supreme Court's recent opinion in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). In that case, the Court rejected the Board's interpretation of "independent judgment" in Sec. 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. However, while the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. The Court also upheld the Board's rule that the burden of proving 2(11) supervisory status rests with the party asserting it. Here, the judge's extended fact-findings at sec. VI, C of his decision confirm that, contrary to the Respondent's contentions, the LPNs exercised only "routine" authority that did not require the use of independent judgment in directing the work of other employees within the meaning of Sec. 2(11). We therefore find that the Respondent has not met its burden of establishing that the LPNs are supervisors.

[4] Although Member Liebman dissented from the holding in *Hacienda Resort Hotel & Casino,* 331 NLRB 665 (2000), that an employer's obligation to check off dues does not survive the expiration of the collective-bargaining agreement imposing that obligation, she and Member Walsh agree that under Board law, the judge correctly dismissed the allegations that the Respondent's postexpiration cessation of checkoff at certain facilities violated Sec. 8(a)(5) and (1).

Meadville facility, shortly before the Union's[5] contract expired, called a mandatory meeting of certified nurse assistants (CNAs) and gave them written questionnaires asking what they knew about, and whether they agreed with, an anonymous letter he had received from one or more CNAs protesting against the Respondent's treatment of employees and patients. At that meeting, the administrator, John Ferritto, also said the letter's authors were "assholes" and "fucking idiots," derided the Union and its ability to service its members, and said that the CNAs who supported the Union were "going to get screwed."

Our dissenting colleague disagrees with the judge's finding that this conduct violated 8(a)(1), characterizing Ferritto's statements as simply an "outburst of temper" and a "response in kind" to what Ferritto reasonably regarded as an "incendiary and defamatory letter." However, the fact is that Ferritto's loud and obscene "tirade" (our colleague's apt word) was hardly delivered in the heat of the moment. As the judge found, Ferritto had known about the letter, including its author, for more than 2 weeks. His statements were made, moreover, in a specially called, mandatory meeting that involved the interrogation of employees. Further, contrary to our colleague, we do not find comparable the statements in the letter complaining about the Employer's treatment of employees and patients and Ferritto's comments that the authors were "assholes" and "fucking idiots" and that union supporters were "going to get screwed."

Accordingly, contrary to our colleague, we agree with the judge that Ferritto's comments were coercive in violation of Section 8(a)(1).

2. We also adopt the judge's finding that the Respondent violated Section 8(a)(5) when, in anticipation of the strike, it unilaterally canceled vacations, personal/bonus days, and leave without pay at its Grandview facility. On receiving the strike notice required under Section 8(g) of the Act, the Respondent had the right to make lawful preparations for the strike. However, contrary to our dissenting colleague's assertion, the Respondent had no license under the Act to make unilateral changes in its represented employees' terms of employment without giving the Union an opportunity to bargain over those changes.

3. We also adopt the judge's finding that the Respondent violated Section 8(a)(5) by implementing a number of unilateral changes in the terms of employment and working conditions at 1 or more of the 20 nursing homes involved in the case, after the expiration of the parties' collective-bargaining agreements. As the judge found, the management-rights clause in those agreements, which the Respondent cites as authority for making these changes, did not survive the contracts' expiration.[6] Moreover, the unilateral changes at issue altered work hours, disciplinary policy, absenteeism policy, job descriptions and duties, medical leave, required in-service meetings, vacation scheduling, conversion of full-time to part-time positions, work schedule posting requirements, unit work jurisdiction, and overtime. It is well settled that these terms of employment are mandatory subjects of bargaining. *NLRB v. Katz,* 369 U.S. 736 (1962); *NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958). It is also settled law that any waiver by a union of its right to bargain over mandatory subjects must be clear and explicit, *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983); and that the employer has the burden of establishing an affirmative defense that a unilateral postexpiration change was consistent with past practice. *Eugene Iovine, Inc.,* 328 NLRB 294 fn. 2 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001).

Our dissenting colleague's unsupported assertions that the Respondent's unilateral changes were permissible "business decisions" even if the management-rights clause did not survive, and that the General Counsel had the burden of showing that these changes were a "radical departure" from the preexpiration terms of employment, are entirely contrary to this established authority. He contends, in effect, that even if a management-rights clause expires with the contract, this waiver of a union's right to bargain has nonetheless established a status quo in the terms of employment which continues beyond contract expiration. This cannot be correct, for the essence of the management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls.[7] If our col-

[5] The Union is Service Employees International Union, AFL–CIO, CLC. All of the Charging Parties are affiliates of the Union. The term "Union local" refers to the particular local union certified to represent the employees at the named facility.

[6] *Paul Mueller Co.,* 332 NLRB 312, 313 (2000); *Ryder/Ate, Inc.,* 331 NLRB 889 fn. 1 (2000); *Ironton Publications,* 321 NLRB 1048, 1048 (1996); *University of Pittsburgh Medical Center,* 325 NLRB 443, 443 fn. 2 (1998), enfd. 182 F.3d 904 (3d Cir. 1999); *Control Services,* 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992); *Buck Creek Coal,* 310 NLRB 1240, 1240 fn. 1 (1993); *Kendall College of Art & Design,* 288 NLRB 1205 (1988); *Holiday Inn of Victorville,* 284 NLRB 916, 916 (1987).

To the extent that certain earlier cases—*Saints Mary & Elizabeth Hospital,* 282 NLRB 73, 78 fn. 13 (1986); *Cummins Component Plant,* 259 NLRB 456, 465 (1981); *Winn-Dixie Stores,* 224 NLRB 1418, 1432–1434 (1976), enfd. in part on other grounds 567 F.2d 1343 (5th Cir. 1978); and *Shell Oil Co.,* 149 NLRB 283, 286–287 (1964)—could be read to imply to the contrary, those cases have been overruled sub silentio by the more recent cases cited above.

[7] Because the waiver embodied in a management-rights clause lasts only until the contract expires, the status quo after contract expiration cannot include the right to make unilateral changes since such changes

league were correct, such a fluid status quo would vitiate an employer's bargaining obligation whenever a contract containing a broad management-rights clause expired. In that event, the expiration of the management-rights clause would be meaningless wherever the employer had taken advantage of the waiver to make changes. Contrary to our dissenting colleague, we decline to depart from well-established precedent to adopt a policy that makes little sense and discourages, rather than promotes, collective bargaining.

Finally, our dissenting colleague's expansive conception of the "necessary decisions," which an employer is permitted to make on a unilateral basis, also would far exceed the narrow category of "economic exigencies," which the Board has long recognized as exceptions to Section 8(a)(5). See *RBE Electronics of S.D.,* 320 NLRB 80, 81–82 (1995). There is no evidence that the decisions involved herein were "necessary" in any sense beyond their being seen as desirable by the Respondent.[8]

4. The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) by laying off employees Irene Susman and Blanche Lyons from Beverly Manor of Monroeville. The judge dismissed the allegations because he found that there was no evidence that the layoffs of the two laundry workers occurred as a result of the Respondent's unlawful implementation of the Attends incontinence program at that facility. However, as indicated in the General Counsel's exceptions, copies of letters to Susman and Lyons informing them of their impending layoff referred specifically to the fact that a "shift in the laundry is being eliminated as a result of reduction in work load due to the Attends incontinent program. Therefore, effective February 8, 1996, you are being furloughed from Beverly Manor of Monroeville." In view of this evidence, to which the judge made no reference, we grant the General Counsel's exception and find that the Respondent violated Section 8(a)(5) and (1) when it laid off Susman and Lyons. *Great Western Produce,* 299 NLRB 1004, 1005–1006 (1990) (discipline or discharge resulting from unlawfully implemented rule violates Sec. 8(a)(5)).

5. The General Counsel has also excepted to the judge's failure to make specific findings as to some of the complaint allegations—findings that would follow logically from the violations he did find. In view of the fact that the issues were alleged and fully litigated, and the violations derive directly from the violations found by the judge, we grant the General Counsel's exceptions and find the following additional violations:

(a) The Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the appropriate Local Union over the implementation of the Attends incontinence program at Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care, Franklin Care Center, Haida Manor, Richland Manor, and Camp Hill Care Center.

(b) The Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the appropriate Local Union over the admitted implementation of the Attends incontinence program at Mt. Lebanon Manor Convalescent Center, Murray Manor, and William Penn Nursing Center.[9]

(c) The Respondent violated Section 8(a)(5) and (1) by failing to provide the Local Union with notice and an opportunity to bargain before laying off housekeeping employees at Haida Manor on or about February 12, 1996.[10]

(d) The Respondent violated Section 8(a)(5) and (1) by failing to provide the Local Union with notice and an opportunity to bargain before laying off Murray Manor employee Helen Ressler and others.[11]

(e) The Respondent violated Section 8(a)(5) and (1) by failing to provide the Local Union with notice and an opportunity to bargain before laying off Richland Manor employees Karen Berkey and Judy Grech.[12]

(f) The Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the Local Union before laying off William Penn Nursing Center laundry department employee Joy Kahly on or about February 20, 1996.[13]

(g) The Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the Local Union before

cannot be made in the absence of a waiver. See cases cited at fn. 6, supra.

[8] We also adopt the judge's finding that the Respondent failed to notify the Union of the discharges of Dan Bump and Julie Whitman at the Meadville facility in violation of Sec. 8(a)(5), and will include them in the remedial order.

[9] In the answer to the complaint, the Respondent admitted it did not notify and bargain with the Local Union over the implementation of the Attends incontinence program at these facilities.

[10] The administrator at this facility testified that two housekeeping employees were laid off as a result of the implementation of the Attends incontinence program.

[11] The employees were laid off the same day as the Attends program was implemented. The Respondent has admitted that it failed to bargain with the Local Union regarding the layoffs.

[12] The Respondent admitted that it laid off Berkey and Grech and the testimony of the Local Union Representative Todd Hobler is uncontroverted that the Respondent did not provide notice of the layoffs or an opportunity to bargain.

[13] In its answer, the Respondent admits that it unilaterally implemented the Attends incontinence program, that the implementation resulted in a reduction in hours in the laundry department and that it laid off Kahly the day it implemented the program.

reducing the hours of dietary and housekeeping employees at Fayette Health Care Center since January 1996.[14]

(h) The Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the Local Union before reducing the hours of Camp Hill Care Center employees in the nursing and housekeeping departments since January 1996.[15]

(i) The Respondent violated Section 8(a)(1) of the Act by threatening employees at Richland Manor for bringing union literature into the facility.[16]

(j) The Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the Local Union before transferring Meadville Care Center employee Barbara Glancey from the day shift to a newly created shift.[17]

(k) The Respondent violated Section 8(a)(5) and (1) by failing to post for bid a newly created shift in the housekeeping department at Meadville Care Center.

6. The Respondent excepts to the judge's finding that it violated Section 8(a)(1) after receiving the Union's strike notice by advertising higher wages for replacement workers at Grandview Manor Nursing Home in March 1996. The judge found that "in the context of the numerous instances of unlawful conduct found in the case," the ad was another attempt to undermine the Union by "threatening yet another unilateral action (raising wages)" if the employees engaged in a strike. There is no dispute that the Respondent ran the advertisement, or that the ad promised higher wages than the Respondent was currently paying. The Respondent contends, however, that its action was privileged because it had no duty to bargain over the terms and conditions of employment for striker replacements, citing *Harding Glass Co.,* 316 NLRB 985 (1995), and *GHR Energy Corp.,* 294 NLRB 1011, 1012 (1989). The Respondent argues that the judge's reliance on *Service Electric Co.,* 281 NLRB 633, 639 fn. 11 (1986), is misplaced. We disagree.

In *Service Electric,* supra, the Board held that although an employer may lawfully hire replacements in the event of a strike and unilaterally set the terms and conditions of employment for those replacements, it may not exercise that right in a manner designed to undermine the Union. Id. Here, the Respondent committed a number of unfair labor practices before and shortly after it placed the ads, including unilateral actions that disparaged the Local Union's representative role and discriminatory treatment of two Grandview Manor union activists. In the context of these unlawful actions, as the judge found, and given the Respondent's corporatewide and centralized policy of hostility to its employees' rights under the Act, discussed infra, the unexplained and publicized offer of higher wages to strike replacements can only be seen as designed further to undermine the Local Union in the eyes of the employees it represented.[18] Accordingly, we adopt the judge's finding that that action violated Section 8(a)(1).[19]

7. In the bifurcated remedial stage of this proceeding, the judge recommended a corporatewide cease-and-desist order and notice posting at all of the Respondent's facilities.[20] He based this recommendation not only on the evidence in the present record but on the Board's findings and decisions in *Beverly California Corp. (Beverly III),* 326 NLRB 232 (1998), enfd. in part and remanded 227 F.3d 817 (7th Cir. 2000); *Beverly California Corp. (Beverly II),* 326 NLRB 153 (1998), enfd. 227 F.3d 817 (7th Cir. 2000); *Beverly Enterprises (Beverly I),* 310 NLRB 222 (1993), enf. denied in relevant part sub nom. *Torrington Extend-A-Care Employees Assn. v. NLRB,* 17 F.3d 580 (2d Cir. 1994); and other cases involving the Respondent.[21] In *Beverly III,* the Board imposed and the Seventh Circuit approved a corporatewide remedial order

[14] Administrator James Filipone admitted that he did not consult with the Local Union before reducing the working hours in the dietary and housekeeping departments.

[15] The Respondent admitted that it reduced the hours of nursing employees at this facility prior to the implementation of the Attends incontinence program and that it did so without notice to or bargaining with the Local Union.

[16] The judge found that Richland Manor Administrator John Poltrack and Director of Nursing Ron Lindrose, on two separate occasions, threatened employees Margaret Pynkais and Donna Zonts with discipline if they continued to bring union literature into the building but found only that the prohibition of union literature was unlawful and failed to find that the threats of discipline also violated Sec. 8(a)(1).

[17] The judge found that the Respondent violated Sec. 8(a)(5) and (1) by failing to notify and bargain over a newly created position but apparently inadvertently failed to find that the transfer of Glancey to that position and the failure to post the position also violated Sec. 8(a)(5) and (1).

[18] The cases relied on by the Respondent and our dissenting colleague are inapposite. All three involved only a respondent's 8(a)(5) right to hire and set the terms and conditions of employment of replacement workers without bargaining with the Union. By contrast, at issue here is whether the Respondent may advertise for such replacement workers in advance of a strike with the purpose of interfering with, restraining, or coercing the employees in the exercise of their Sec. 7 rights.

[19] In view of this finding, we find it unnecessary to pass on the Respondent's exception to the judge's finding that the Respondent also violated Sec. 8(a)(1) by advertising for replacement workers at Meadville.

[20] The recommended Order in the judge's supplemental decision supersedes his initial orders.

[21] The Respondent objects to the judge's having relied in part on 11 previous Board cases involving the Respondent, cited in fn. 23 of his decision, to support his finding that the Respondent has a proclivity to violate the Act. As in *Beverly I,* 310 NLRB at 227–228 fns. 23 and 25, we do not rely on those cases in adopting this finding. However, it was not improper for the judge to consider the other cases he cited in this connection.

and posting requirement on the basis of the pervasive involvement of the Respondent's corporate, divisional, and regional officials in a wide range of unfair labor practices at 54 of the Respondent's facilities in 18 States.[22]

As in *Beverly III,* we agree with the judge's recommendation.[23] In this case, we have not only the now-familiar pattern of involvement of the Respondent's corporate personnel in the unlawful actions found to have occurred, but convincing documentary evidence of the Respondent's corporatewide responsibility for almost all of its actions pertaining to its employees' protected activities. The Respondent's assertions that its corporate personnel provided only "support and consultation" solely in order to "ensure compliance" with the Act are based largely on the testimony of its corporate witnesses, which the judge did not credit.[24] As the judge found, "in almost every instance where unfair labor practices are found herein Beverly officials above the facility level were either directly involved or, having knowledge of what was happening, took no steps to avert violations." High-ranking corporate and regional officials who played prominent roles in directing, approving, or knowingly failing to prevent unlawful actions included Beverly President Bill Mathies; Vice President for Labor and Employment Donald Dotson; Region 1 (Northeast) Vice President of Operations Claude Lee; Region 1 Director for Associate Relations Wayne Chapman; and Region 1 Labor Relations Manager Ron St. Cyr.[25]

We also agree with the judge that the Respondent's internal corporate structure and centralized control of virtually all aspects of its business activities meet the Board's criteria for finding the Respondent and its facilities to be a single employer for remedial purposes.[26] In the area of labor relations, the Respondent established and consistently enforced a range of centralized operational procedures and reporting requirements in connection with monitoring its employees' union or concerted activities. This included centralized involvement in collective bargaining with the Union, maintaining or changing terms and conditions of employment after contract expiration, restricting or permitting union access to the Respondent's facilities, handling grievances, responding to the Board's and the Union's information requests, and preparing for and responding to strikes and union corporate campaigns, including communications with the media and the public. Corporate and regional officials provided ongoing instruction and guidance in all of these areas. With respect to dealing with the Union or the Board, local facility administrators were specifically forbidden from taking certain actions without approval—e.g., responding to the Board's or the Unions' requests for information, negotiating union contracts, resolving

[22] The court remanded the Board's order in *Beverly III* for modification. We discuss that remand, infra.

[23] The Respondent, citing Sec. 17415 of the NLRB Manual (Division of Judges), excepts to the judge's having chosen to incorporate excerpts of the General Counsel's brief in the factfinding section of his supplemental decision. It is true that we discourage the extensive incorporation of a party's brief into a judge's decision, in order to preclude an appearance that the judge failed to base his decision on an independent analysis. *Waterbury Hotel Management LLC,* 333 NLRB 482 (2001); *Regency Electronics,* 276 NLRB 4 fn. 2 (1985). However, such borrowing of text is not, in and of itself, reversible error. Id. The judge's analysis of the material facts and applicable legal authorities, which (except for an elementary opening paragraph) the Respondent does not allege was borrowed from the General Counsel's brief, demonstrate that his decision was based on independent judgment.

[24] Although the Respondent contends that its corporate-level efforts to ensure compliance with the Act have steadily reduced the number of unfair labor practices it has been found to have committed over time, the figures the Respondent cites to support this contention do not include the unfair labor practices found in this proceeding.

[25] In *Beverly III,* corporate and divisional personnel were found to have frequently visited the respondent's facilities to play a role in the unlawful activities that occurred. Here, although there is less specific evidence of corporate personnel coming physically on site to engage in unlawful conduct, there is abundant evidence of their affecting policy and actions taken at the facility level on an ongoing basis through the corporate chain of command.

[26] As a procedural matter, we note that the parties, with the judge's permission, agreed to "move into the record" the remedial-stage hearing transcripts and exhibits from *Beverly II* and *Beverly III,* without actually introducing any of those exhibits or transcript excerpts as individual exhibits in this case. At the time of the hearing in this proceeding, the judges' decisions in *Beverly II* and *Beverly III* were pending before the Board. The parties' stated reason for following this procedure was to limit the size of the record and avoid extensive duplication. However, the General Counsel provided a separate set of the relevant material from the two previous cases to the judge after the hearing. In their briefs, both the General Counsel and the Respondent have cited to exhibits in the earlier records.

Of course, litigants before the Board may, at the judge's discretion, introduce copies of relevant testimony or exhibits from a previous proceeding. The parties' concern for minimizing the length of a case record is also laudable. However, we strongly discourage the practice of verbally incorporating entire sections of previous trial records into the record en masse as an alternative to introducing the particular excerpts or exhibits on which a party intends to rely. The undifferentiated incorporation, in whole or in part, of a separate trial record tends to make it more difficult for the Board and a reviewing court to identify the specific evidence on which the judge's findings were based. Incorporation of the record of another case which is still pending before the Board may also create complications in jurisdiction between the Board and reviewing courts of appeals. Moreover, requiring the Board to review portions of the records of previous cases (which may be located at different sites) puts an additional burden on the Board's resources and can cause significant delay in the processing of cases. For all of these reasons, the Board expects the parties in each case to introduce all nontestimonial evidence on which they rely in the form of individual exhibits.

grievances beyond the second step, or agreeing to arbitrate grievances.[27]

Similarly, in the broader area of human resources, the Respondent maintained centralized policies and procedures in job classification, wage and hour compliance, OSHA reporting, Family and Medical Leave Act compliance, ADA compliance, time and attendance, pay increases, overtime, payroll, transfer of employees between facilities, employee health/injuries, workers' compensation, employee training, behavior policy, employee benefits, employee evaluations, sexual harassment, and affirmative action.

The Respondent contends that the Union's campaign to achieve a single contract for all 20 of the Pennsylvania facilities at issue created a "unique" situation, and that its coordinated response was atypical and limited to Pennsylvania. However, the Respondent operated in a similarly centralized and coordinated manner in 1992, the last time contracts were negotiated for these facilities. Moreover, even if the 1995–1996 negotiating situation in Pennsylvania had been "unique," as the Respondent contends, that would not negate the judge's critical finding, which we adopt, that all of the Respondent's policies and strategic decisions concerning labor relations were formulated and implemented by corporate and regional management.

On the basis of the record in this case and our findings in *Beverly III,* supra, we agree with the judge that the Respondent's violations in their entirety reflect a sustained, corporate-level union animus and "an abiding determination to demonstrate to employees . . . the futility of recourse to unionization and its concomitant need to bargain collectively"; that the Respondent, "in pursuing that objective [was] . . . more than willing to and frequently did resort to unlawful means"; and that the Respondent's "efforts to defeat employees' protected right to organize [are] not confined to the particular facilities and area involved in this proceeding but extend nationwide." We accordingly find that the Respondent continues to have a proclivity to violate the Act; that its widespread misconduct demonstrates a general disregard for its employees' Section 7 rights; and that, absent a corporatewide remedy, the Respondent is likely to commit such unlawful actions at its other facilities against other employees.

The authorities cited by the Respondent do not support its position that a corporatewide order is inappropriate in this case. In *Beverly I,* supra, where the reviewing court declined to enforce a corporatewide order, there was much less record evidence of corporate involvement in the misconduct found.[28] In the only other cited case in which a reviewing court refused to enforce a corporatewide order, *Florida Steel Corp.,* 244 NLRB 395 (1979), remanded sub nom. *Steelworkers v. NLRB,* 646 F.2d 616 (D.C. Cir. 1981), on reconsideration 262 NLRB 1460 (1982), enf. denied in relevant part 713 F.2d 823 (D.C. Cir. 1983), the Board's remedy included corporatewide access for the union to the respondent's facilities.[29] Here, although the General Counsel sought such access for the Union, the judge declined to recommend it. The judge's Order is broad in its terms[30] and extends to all of the Respondent's facilities. But its affirmative requirements are limited to reinstating and making whole employees who suffered unlawful discrimination; complying with the duty to bargain and to provide information; restoring terms and conditions of employment subject to bargaining; and posting notices.

Such a remedy falls well within the Board's authority to define the scope and terms of a remedial order as "necessary to prevent the employer before it from engaging in any unfair labor practice affecting commerce." *May Department Stores Co. v. NLRB,* 326 U.S. 376, 390 (1945). As we concluded in *Beverly III,* "[t]he procession of violations in facility after facility of the Respondent's operations and the continuing involvement of officials above the facility level in labor relations . . . warrants a remedial approach that is something other than business as usual." 326 NLRB at 238. The Seventh Circuit agreed, finding that "[t]he Board was entitled to conclude, especially after specific remedies in [*Beverly I*] did not appear to stop the efforts from the Company's central management to stop unions in any way possible, that the time was past for piecemeal relief." 227 F.3d at 847. As we also observed in *Beverly III,* the fact that the Board has not issued a corporatewide order in some cases where

[27] For example, in one memorandum pertaining to an information request, a facility administrator inquired of Director of Associate Relations Chapman: "Is this what we were to be slow responding to?"

[28] As we noted in *Beverly III,* "[t]he fact that the court [in *Torrington*] viewed the role of regional or divisional officials [in *Beverly I*] as insignificant even if 'isolated unfair labor practices occurred' when they were present does not foreclose a different finding if the record, as here, shows a continuing pattern of unfair labor practices thereafter." 326 NLRB at 237.

[29] The D.C. Circuit's lengthy analysis in *Florida Steel,* supra, selectively quoted by the Respondent, focused almost entirely on the Board's authority to order corporatewide access for the union. 646 F.2d 616. In addition, the employer's unlawful conduct in *Florida Steel* consisted of only one unfair labor practice involving two employees that was "concededly minor [and] inconsequential." 713 F.2d at 835–836.

[30] We agree with the judge that the Respondent's history of repeated violations and its established proclivity to violate the Act necessitate a broad cease-and-desist order. *Hickmott Foods,* 242 NLRB 1357, 1357 (1979).

such an order might have been warranted does not preclude us from doing so here.

Finally, we reject the Respondent's contention that corporatewide posting will "chill the exercise of Section 7 rights" by "telling employees about unfair labor practices that occurred at other locations." It is true, as the Respondent points out, that an employer's corporatewide publication of the unlawful actions it has taken at one facility is unlawful, since such publication indeed has such a chilling effect. E.g., *J. P. Stevens & Co.,* 239 NLRB 738 (1978), enfd. 623 F.2d 322 (4th Cir. 1980). However, an employer's voluntary corporatewide publication of its own misconduct is not in any sense comparable to a remedial Board order posted corporatewide, since the latter informs employees not only that employer misconduct has occurred, but also that the misconduct was found by the Board to be unlawful and is being corrected.

The General Counsel, in his limited exceptions, seeks extraordinary remedies in addition to those provided in the judge's Order. First, as noted above, he requests special access for the Union to post notices and to address the employees at the Respondent's facilities in connection with organizing campaigns and representation elections for a period of 2 years. The judge found, and we agree, that such additional extraordinary remedies are not appropriate in this case, which involves no organizing campaigns or representation proceedings.[31]

The General Counsel also asks that the Respondent be required to reimburse the Agency for the litigation expenses it incurred in establishing that the Respondent is a single employer, asserting that the Respondent's position to the contrary was rejected by the Board in *Beverly III* and is patently meritless on its face. Because the Board's decision in *Beverly III* has only recently been upheld by a court of appeals, we agree with the judge that an award of litigation costs would not be appropriate here. We note, however, that the Respondent's single-employer status has now been exhaustively litigated in three separate Board proceedings, entailing considerable expenditure of the Agency's resources, and that our finding on this issue today merely reaffirms our earlier findings in *Beverly I* and *Beverly III*.[32] In addition, as noted above, the Seventh Circuit—without the benefit of the additional supporting evidence on the record of this case—has already endorsed our conclusion that the Respondent satisfies the Board's established criteria for requiring corporatewide relief. It therefore appears highly unlikely that, absent significant changed circumstances, further litigation on this issue would be warranted in future cases involving the Respondent.

Finally, we address the issue raised in the Seventh Circuit's remand in *Beverly III*. In that case, as indicated above, the Seventh Circuit agreed that a corporatewide remedy was justified, but remanded our order because, in its view:

> [M]uch of it is no more than a laundry list of the particular violations committed at individual facilities. There is no reason, for example, for the corporate-wide order to devote two paragraphs to [discriminatee] Julie Schriner's situation (and she is there in the order by name). 227 F.3d at 847.[33]

The court left it to the Board on remand to "decide which parts [of the order] are properly directed to the corporation as a whole and which to particular facilities," but stated that "corporate-wide relief. . . . should be supplemented with relief directed to the individual facilities, for instances in which the violation does not have significance beyond them." Id. The Board subsequently accepted the court's remand and issued a revised order. *Beverly California Corp.,* 334 NLRB 713 (2001).

The court's decision in *Beverly III* is not the law of the case in this proceeding and consequently does not compel the same remedy here. Nevertheless, because we accepted the remand in that case and because this proceeding involves a corporatewide order against the same employer, we will attempt to address the court's concerns in crafting our order.

The Seventh Circuit did not state or imply in its opinion that the Respondent would have been prejudiced by the Board's order as issued in *Beverly III*. The court's main concern appears to have been that, insofar as the remedial notices required for posting referred to matters that were not widely known, they would not be meaningful to employees or local managers and supervisors. However, other readings of the court's opinion are also possible. The opinion may imply that violations of the Act which occur only at one facility can have no "significance" elsewhere, even where the Board has found the respondent to be a single, multifacility employer with a proclivity to violate the Act. It could also be interpreted to suggest that, even where a corporatewide remedy is generally appropriate, the Board should issue a set of

[31] Although the Respondent's unlawful actions included the denial of union access to certain facilities in violation of Sec. 8(a)(5), the judge's Order provides remedies for these violations.

[32] We declined to order a corporatewide remedy in *Beverly II* only because that was unnecessary in view of the corporatewide order we issued in *Beverly III* the same day, based on the cumulative misconduct by the Respondent in all three cases: *Beverly I, Beverly II,* and *Beverly III*.

[33] Schriner had been unlawfully placed on a 3-day suspension by a corporate official and a regional official. 326 NLRB at 277–278.

remedial orders and notices individually tailored for each covered facility.

We agree with the court to the extent that some employer violations of the Act can have a more strictly local impact than others. We also agree that the terms of a corporatewide order and required notice should be meaningful to all of the respondent's employees and to all of its local managers and supervisors.

However, we believe that where a single-employer respondent has demonstrated a proclivity for violating the Act at a significant number of facilities, we should issue a single, corporatewide remedial order addressing all of the violations found. We also believe that in such cases the required notices to employees should not be individually tailored and restricted to the misconduct that occurred at each facility, but should vary from each other only to the extent necessary to maximize their remedial impact.[34]

We place this emphasis on uniformity and comprehensive scope for the following reasons:

First, as demonstrated above, where we determine that a respondent is a single employer with a proclivity for violating the Act, we have necessarily determined that the unfair labor practices found have generally emanated from a central source. The particular location where employees engaged in Section 7 activity consequently had little or no bearing on the respondent's decision to respond in an unlawful manner; the respondent would presumably have committed the same or similar violations regardless of where the protected activity occurred. In short, although the respondent's propensity to violate the Act was manifested primarily where employees happened to exercise their Section 7 rights, the propensity exists corporatewide. This militates in favor of issuing a single, comprehensive remedial order and notice which will have a deterrent effect at all the respondent's facilities.

Second, as a practical matter, once a single employer is shown to have established a pervasive corporate environment in which local management is encouraged and even expected to violate the Act, we may fairly presume for the purpose of remedy that all the violations found are at least in part attributable to that environment. In that context, for remedial purposes, we are more inclined to assume that a single-site violation had significance at other facilities than that it did not.[35] Particularly where the facilities at issue are located in the same geographic area, we will not assume that a violation committed at one facility has no reverberations at others. Moreover, with respect to notice posting, we cannot assume that a corporatewide environment that undermines respect for the Act has not adversely affected employees' understanding of their Section 7 rights. In this context, it is important that employees located at facilities other than the one where a particular unfair labor practice was committed should have the benefit of being informed that the respondent has been sanctioned for that violation. This information gives employees a better understanding of their rights and makes them aware that the Board protects employees shown to have been victimized by their employer's violations of the Act. The same posted information can also be expected to improve local management's understanding of and compliance with the Act.

Finally, in a case involving violations at multiple facilities, the use of a single order and a notice conserves the Board's limited resources and minimizes the potential for confusion. In some cases it might be relatively easy to tailor individualized orders for separate facilities. In other cases, however, where there is a significant but nonuniform overlapping of violations among many facilities, the task can be disproportionately complicated. The resulting multiplicity of orders and notices could be administratively burdensome and could generate confusion for affected employees, not to mention for the respondent or its local management. A generalized but undefined requirement to tailor the order to each individual facility could even invite further litigation over the appropriate form of orders and notices.

The Board, of course, bears the primary responsibility for determining the appropriate remedies for violations of the Act. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 898–899 (1984); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 193–196 (1941); *APRA Fuel Oil Buyers Group,* 320 NLRB 408, 410 (1995), enfd. 159 F.3d 1345 (2d Cir. 1998). To the extent that we discharge this responsibility in a manner consistent with that obligation, we believe it is within the scope of our discretionary authority to determine the proper form of substantively appropriate remedial provisions. In this respect, we favor simplicity and uniformity for the reasons explained above.

With these considerations in mind, and in order to address the concerns of the court in *Beverly III,* we will modify the judge's recommended corporatewide order to require the posting of two versions of the notice to employees—one to be posted at each Pennsylvania facility involved in this proceeding and at those of the Respondent's separate offices which oversee those facilities; and one to be posted at each of the Respondent's other facilities and

[34] As will be seen below, the practical result here differs from the result apparently intended by the court in *Beverly III* only in that we require a single, comprehensive remedial notice to all 20 of the Respondent's Pennsylvania facilities involved in this proceeding, rather than 20 facility-specific notices.

[35] Even were we to take a narrower approach, we would find that very few of the violations committed by the Respondent in this case were facility-specific.

offices nationwide. For the sake of clarity, where the order and required notice specify individual employees by name, they also indicate that the remedy is to be provided at the facility where the employee is employed.[36]

ORDER

The Respondent, Beverly Health and Rehabilitation Services, Inc., Ft. Smith, Arkansas, its Operating Divisions, Regions, Groups, wholly owned subsidiaries, and individual nursing homes, and each of them, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow union representatives access to its nursing facilities as required pending the negotiation of new collective-bargaining agreements.

(b) Refusing to allow posting of union-related notices on bulletin boards in those facilities as required pending the negotiation of new collective-bargaining agreements.

(c) Laying off employees without affording to their bargaining representative (Service Employees International Union, AFL–CIO, CLC, and its appropriate Local Unions) adequate prior notice and opportunity for bargaining.

(d) Adopting a health insurance plan for employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to return home and retrieve their identification badges before permitting them to work without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Eliminating bargaining unit positions and assigning unit work to nonunit employees without affording to unit employees' bargaining representative adequate prior notice and opportunity for bargaining.

(h) Requiring employees to work overtime and eliminating their opportunities for voluntary overtime without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(i) Failing to give the employees' bargaining representative adequate prior notice and opportunity for bargaining before changing other terms and conditions of employment, including: work schedules and related-advance posting requirements; absentee policies; requirements for doctor's certification for absence for illness; rules related to vacation scheduling and duration; and job descriptions.

(j) Failing to honor union requests to bargain over changes in employees' terms and conditions of employment.

(k) Bypassing appropriate union representatives and dealing directly with unit employees.

(l) Failing to comply with union requests for information that would be of use to the Union in carrying out its statutory duties and responsibilities as collective-bargaining representative of the Respondent's employees.

(m) Failing to process union grievances in a timely manner.

(n) Changing the job description of licensed practical nurses (LPNs) without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(o) Changing LPN work and vacation schedules without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(p) Refusing to respond to information requests from the Union related to the changes in LPN status; refusing to bargain over such changes; and dealing directly with LPNs concerning the changes.

(q) Changing the job description of LPNs in retaliation for their supporting the union.

(r) Engaging in or threatening to engage in unlawful surveillance, including videotaping, of employees' union or protected, concerted activities.

(s) Changing the break schedule of union supporters to inhibit their ability to engage in union-related activities.

(t) Soliciting employees to resign from union membership, interrogating them about their willingness to strike, or threatening them with reduced hours if they engage in a strike.

(u) Reducing employees' work hours to discourage them from continuing to support the Union.

(v) Threatening employees with discipline and discharge for supporting Unions or for complaining about working conditions.

(w) Threatening to grant wage increases to replacement workers in the event of a strike in a manner and

[36] The General Counsel excepts to the judge's inadvertent failure to include in the Order's make-whole provisions several named employees and other unnamed employees whom he found were prejudiced by the Respondent's violations of Sec. 8(a)(5); and his failure to include, with respect to other violations of Sec. 8(a)(5), remedial requirements to bargain with and provide relevant information to the Union on request. We grant the exceptions pertaining to the Respondent's duties to bargain and to provide information. With respect to make-whole relief, we grant the exceptions pertaining to Barbara Glancey, Helen Ressler, Karen Berkey, Judy Grech, Joy Kahly, and other unnamed employees, and will include them in the Order's make-whole provisions. Similarly, since the judge found that the Respondent violated Sec. 8(a)(3) by suspending Connie Kollar for her union support and activity at Haida; by requiring CNA Ruth Pilarski to take her morning and afternoon breaks at different times from other CNAs at William Penn; and by reducing the working hours of LPN Beverly Higbee for her union activity at Grandview, we will include them in the Order's make-whole provisions.

context designed to undermine the Union in the eyes of the employees it represents.

(x) Soliciting and implicitly promising to remedy employee grievances in order to dissuade them from supporting the Union.

(y) Disparaging employees who engage in the protected concerted action of protesting unfair working conditions by calling them derogatory names or by using other derogatory language.

(z) Prohibiting employees from leaving union literature in breakrooms; prematurely removing such literature; and prohibiting employees from selling union insignia on off-duty time in breakrooms.

(aa) Refusing to allow duly selected employee union representatives to attend labor-management meetings.

(bb) Failing to reinstate unfair labor practice strikers immediately on receipt of their unconditional offer to return to work.

(cc) Discharging or suspending employees without giving the Union the required timely notice.

(dd) Changing employees' morning or afternoon breaktimes to prevent them from meeting with other employees or from engaging in other union-related activities.

(ee) Reducing employees' working hours for serving on union negotiating committees or for engaging in other union activities.

(ff) Discharging or suspending employees in retaliation for attending union meetings, hosting union meetings in their homes, participating in union protest marches, wearing union buttons and insignia, serving on a union negotiating committee, urging other employees to support the Union during an impending strike, or actively supporting unionization, or to deter other employees from engaging in such union activities.

(gg) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to their former jobs to all employees who participated in the unfair labor practice strike which commenced on April 1, 1996, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

(b) Make those employees whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them.

(c) Within 14 days from the date of this Order, offer full reinstatement to their former jobs to Irene Susman and Blanche Lyons at Beverly Manor of Monroeville, Dan Bump and Julie Whitman at Meadville Care Center, Helen Ressler at Murray Manor, Karen Berkey and Judy Grech at Richland Manor, and Joy Kahly at William Penn Nursing Center and, on request, restore the 8 a.m. to 4 p.m. shift of Barbara Glancey at Meadville Care Center, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Irene Susman and Blanche Lyons at Beverly Manor of Monroeville, Dan Bump and Julie Whitman at Meadville Care Center, Helen Ressler at Murray Manor, Karen Berkey and Judy Grech at Richland Manor, and Joy Kahly at William Penn Nursing Center whole, with interest, for any loss of earnings or other benefits suffered as a result of the Respondent's unilateral changes in their terms and conditions of employment in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, offer full reinstatement to their former jobs to Sharon Proper at Grandview Health Care, Diane McNulty at Haida Manor, and Sara Sharbaugh at Haida Manor without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make Sharon Proper at Grandview Health Care, Diane McNulty at Haida Manor, and Sara Sharbaugh at Haida Manor whole, with interest, for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of this Order, make Connie Kollar at Haida Manor whole, with interest, for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful suspension of her, in the manner set forth in the remedy section of the decision, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(h) Within 14 days from the date of this Order, on request, restore the pre-January 1996 morning and afternoon breaktimes of Ruth Pilarski at William Penn Nursing Center, and on request restore the pre-January 1996 working hours of Beverly Higbee at Grandview Health Care, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them in the manner set forth in the remedy section of the decision.

(i) Within 14 days from the date of this Order, remove from its files any references to the Respondent's unlawful failure to rehire each employee who participated in the unfair labor practice strike which commenced on April 1, 1996; to the Respondent's unlawful discharges of Sharon Proper, Diane McNulty, and Sara Sharbaugh; to the Respondent's unlawful suspension of Connie Kol-

lar; to the Respondent's unlawful change of breaktimes for Ruth Pilarski; and to the Respondent's unlawful reduction of the working hours of Beverly Higbee; and, within 3 days thereafter notify each of these employees in writing that this has been done, respectively, and that the unlawful action will not be used against him or her in any way.

(j) On the Union's request, rescind all unilateral actions here found to have been affected in violation of the Respondent's obligation to give notice and to bargain, restore all other employees to former positions, shifts, or work hours lost due to those actions, and make all other employees adversely affected by those actions whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the remedy section of the judge's decision.

(k) Provide the Union and its appropriate Local Unions as the exclusive representative of the Respondent's unit employees with notice and an opportunity to bargain, with respect to any prospective changes in rates of pay, wages, hours, and other terms and conditions of employment.

(l) On the Union's request, provide any requested information that is necessary and relevant to the Union's statutory duties and responsibilities as collective-bargaining representative of the Respondent's employees.

(m) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(n) Within 14 days after service by the Region, post at each of the individual nursing homes in Pennsylvania involved in this proceeding and the Respondent's associated offices overseeing these Pennsylvania facilities copies of the attached notice marked "Appendix A."[37] These individual facilities include: Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care (Uniontown), Franklin Care Center (Waynesburg), Grandview Health Care (Oil City), Haida Manor (Hastings), Meadville Care Center, Meyersdale Manor, Mt. Lebanon Manor, Murray Manor (Murrysville), Richland Manor (Johnstown), William Penn Nursing Center (Lewistown), Beverly Manor of Reading, Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center (Camp Hill), Caledonia Manor (Fayettsville), Camp Hill Care Center, Carpenter Care Center (Tunkhannock), Stroud Manor (Stroudsburg), and York Terrace Nursing Center (Pottsville). The appropriate copies of each notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility at any time since November 16, 1995.

(o) Within 14 days after service by the Region, post at each of its other nursing homes and corporate offices copies of the attached notice marked "Appendix B."[38] The appropriate copies of each notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility at any time since November 16, 1995.

(p) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[38] See fn. 37, supra.

CHAIRMAN HURTGEN, dissenting in part.

Unlike my colleagues, I do not find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing unit employees' hours of work at 13 of its facilities. The Respondent defended against this allegation by, inter alia, citing a broad management-rights clause contained in each of the relevant expired contracts. The clause provided, inter alia, that the Respondent could effect reductions in hours without bargaining.

The judge rejected this argument, citing precedent for the proposition that a management-rights clause does not survive the expiration of a contract. Excepting to the judge's finding that it unlawfully reduced unit employees' hours of work, the Respondent argues, inter alia, that another line of Board cases stands for the proposition that a management-rights clause does survive contract expiration, and that postexpiration changes made in reliance on such a clause are therefore lawful.

I find it unnecessary to pass on this question. In my view, even assuming arguendo that the instant management-rights clause did not survive contract expiration, the changes at issue were lawful. That is, even if the management-rights clause expired with the contract, the work practices that were extant during the contract constituted a part of the terms and conditions of employment. Thus, if the employer, after contract expiration, continues to act consistently with those practices, it has not "changed" the status quo and it has not violated Section 8(a)(5). An employer violates Section 8(a)(5) only where the change is material, substantial, and significant.[1] The burden is on the General Counsel to establish the violation, i.e., to show the substantial change. In sum, I would allow an employer to function as it did before contract expiration, according it the right to make management decisions of the same kind and degree that it made during the life of the contract. If, on the other hand, an employer were to depart substantially, in either kind or degree, from the management decisions it had made while the contract was in effect, I would find such conduct presumptively unlawful. Finally, the burden is on the General Counsel, as part of its case-in-chief, to establish such a departure.

In the instant case, it is clear to me that the changes were of the type that were made under the management-rights clause. Further, there is no record evidence establishing that the reductions in hours made by the Respondent represented a substantial departure from the types of management decisions it made while the contract was in effect. On the face of it, such changes would appear to be part and parcel of the normal decisions that Respondent made to keep its business as a going concern.

My colleagues say that my position would mean that an employer's entire bargaining obligation would be vitiated on the expiration of a contract with a broad management-rights clause. In truth, my position is not nearly so sweeping. I simply assert that the actual practices which were extant during the life of the contract would continue after the contract expires. This is as true for provisions that are in the interests of employees (wages and benefits) as it is for provisions in the interests of employers (practice of taking unilateral action). After all, collective bargaining is a two-way street.

My colleagues also state that, in situations such as the instant one, I would allow an employer more discretion than is afforded by the Board's highly restrictive doctrine regarding "economic exigencies." In my view, one has nothing to do with the other. The discretion permitted here is predicated not on an economic exigency, but rather on the fact that, as to the conduct at issue, the Respondent lawfully continued to act consistently with its past practice. Thus, as a statutory matter, the status quo continued, even after contract expiration, until impasse or agreement on different terms. The discretion exercised by the Respondent as to these matters was as much a part of the status quo as were the employees' wages and benefits. Thus, just as the latter continue as a matter of law after contract expiration, so does the former. I would accordingly dismiss this allegation.[2]

The judge and my colleagues find that the Respondent violated Section 8(a)(1) of the Act by advertising for replacement employees at two of its facilities at a rate of pay higher than that paid to unit employees at those facilities. I disagree. As the Board recently reiterated in *Detroit Newspapers,* 327 NLRB 871 (1999), an employer need not bargain with a union with regard to the terms and conditions of employment for replacements hired during a strike, and accordingly may unilaterally set different terms and conditions for such replacements. That is precisely what the Respondent has done, and I therefore find that it acted lawfully.[3]

[1] See, e.g., *Peerless Food Products,* 236 NLRB 161 (1978).

[2] I, therefore, disagree with the judge as to the violations found under the heading "Other Unilateral Changes" and as to the violations found at the Respondent's Monroeville and Fayette facilities with regard to alleged changes in job descriptions and disciplinary policy for licensed practical nurses. Based on the same rationale, I also disagree with my colleagues' reversal of the judge as to Irene Susman and Blanche Lyons, and as to their findings of additional violations, except for the Richland Manor threats, supra, which I agree were unlawful.

[3] My colleagues, in agreeing with the judge's finding, state that the Respondent's offer was calculated to undermine the Union in the eyes of those whom it represented. In reaching this conclusion, however, they rely on other actions by the Respondent which I, unlike them,

The judge found that the Respondent violated Section 8(a)(1) when John Ferritto, the administrator of its Meadville facility, used assertedly abusive language in denouncing, at a mandatory meeting with unit employees, a letter sent to a labor relations director for the Respondent on behalf of unidentified "CNAs of Meadville" (CNAs are certified nurse's assistants). The letter indicated that copies had been sent to the Respondent's personnel director and to the Pennsylvania Department of Public Health. The letter stated, inter alia:

> Then you wonder why so many people call off? We are so physically and emotionally exhausted, if we didn't call off, we would probably end up being committed. You people are literally killing us, and you don't even care! What's worse, you don't appear to care about the residents! You treat us like the scum of the earth. You treat the residents like mindless objects with no feelings when you move them from room to room or wing to wing with no regard to what they prefer. You threaten us with more write-ups and wonder why you can't get help or new admissions.

CNAs were given copies of the letter as they entered the meeting and were asked to read it. Later they were given a paper asking whether they knew about the letter and whether they agreed with its contents. Some responded, others did not.

The judge found that Ferritto, via his assertedly abusive speech and the questionnaire, at a time when the Union's ability to obtain a new contract was in doubt, unlawfully sought to discourage employees from engaging in the protected concerted activity of protesting perceived unfair working conditions.

In my view, however, the judge did not give adequate consideration to the contents of the letter that triggered Ferritto's statements. The letter was reasonably perceived as incendiary and could reasonably trigger a response in kind. Thus, although Ferritto's language may have been intemperate—he called those responsible for the letter "—holes" and "—ing idiots"—his reaction seems to have been simply an outburst of temper in response to what he reasonably considered an incendiary and defamatory letter. Although he did say that those who supported the Union would "get screwed," the context indicates that he was expressing the view that the Union, not the Respondent, would "screw" its supporters by not properly representing their interests.

My colleagues state that Ferritto had known about the letter, including its author, for more than 2 weeks. My position, however, does not depend on viewing Ferrritto's speech as a sudden, irresistible impulse triggered by a contemporaneous event. I also note that the Board routinely protects statements by prounion employees featuring language as objectionable as that employed by Ferritto. In sum, Ferritto's tirade, though crude and no doubt unpleasant to listen to, did not contain threats of reprisal for supporting the Union (or promises of benefits for opposing it). Thus, I do not find it unlawful.

The judge found that, at the Respondent's Caledonia facility, Administrator Maria Spinazzola violated Section 8(a)(1) when, in response to a complaint from Shop Steward Tena Kauffman that CNAs were "always being short staffed and needed more help," she told Kauffman that because of the complaint she had directed registered nurses (RNs) and licensed practical nurses (LPNs) to assist in performing CNA duties "when needed." Noting that he had previously found implementation of that directive to be a unilateral change in violation of Section 8(a)(5), the judge concluded that, as communicated to Kauffman, it also constituted an unlawful threat of retaliation for complaining about working conditions.

I disagree. I note that the implementation of the directive at issue was among the "other unilateral changes" which, unlike the judge, I do not find unlawful. It, therefore, follows that, when Spinazzola told Kauffman about the directive she was not threatening her but merely informing Kauffman as to the lawful measures the Respondent had taken in response to the complaint. Accordingly, I do not find Spinazzola's statement violative of Section 8(a)(1).

The judge found that the Respondent, at its William Penn facility, unilaterally reduced the working hours of all CNAs from 10 to 8 days per 2-week pay period. Noting that he had previously found this change to be a violation of Section 8(a)(5), the judge concluded that the reduction in hours, shortly after contract expiration and accompanied by numerous other unlawful acts, also constituted a discriminatory attempt to discourage continuing membership in the Union in violation of Section 8(a)(3).

As noted supra, I do not agree that the reduction in hours at issue violated Section 8(a)(5). To the extent that that purported violation forms part of the judge's rationale for the 8(a)(3) finding, I do not agree with the judge. Although it is not entirely clear precisely which "numerous other unlawful acts" the judge is relying on here, I

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consider lawful. I therefore do not share their view that the offer was calculated to undermine the Union.

My colleagues state that the Respondent advertised for replacements in advance of a strike with the purpose of interfering, restraining, or coercing employees in the exercise of their Sec. 7 rights. I do not agree that the General Counsel has established that that was the Respondent's purpose, and I attach no significance to the fact that the advertisements preceded the strike. An employer need not wait, motionless, while a strike looms ever closer.

assume that a significant number of them involve findings from which I dissent. The mere fact that the reduction, which I do not find to be otherwise unlawful, took place shortly after contract expiration does not, in my view, satisfy the criteria for finding a violation of Section 8(a)(3). I, therefore, do not find that the William Penn reduction of hours violated that provision of the Act.

The judge found that, at the Respondent's Grandview facility, it changed the hours of LPNs in January 1996 and at various times thereafter. He further found that it canceled, in anticipation of the strike, all employee vacations, personal/bonus days, and requested days off without pay until further notice, and that these actions were taken without notice or bargaining with the Union. Noting that the LPN unit had long been certified, the judge found that these unilateral changes violated Section 8(a)(5) of the Act.

As to the hours changes, I have already expressed my view that such adjustments were lawful. With respect to the cancellations, I note that Respondent took these actions because it reasonably feared an imminent strike. An employer need not stand by helplessly when threatened with a strike. It can take actions (e.g., a lockout) to defend against a threatened strike. In the instant case, Respondent's actions were permissible responses to a threatened strike. In the context of the looming strike, I do not find these actions unlawful.[4]

An employer need not bargain about its use of economic weaponry or the defensive response to the union's use of such weaponry.[5] Accordingly, these changes were lawful.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

This Notice has been posted as a result of a long series of cases brought by various unions and individuals against Beverly before the National Labor Relations Board. In these cases the NLRB, based on Beverly's recurring violations of the National Labor Relations Act, issued an order requiring Beverly to cease and desist from committing such unlawful conduct, not only at the nursing homes which were involved in the proceedings, but also at all other Beverly nursing homes and offices. The NLRB's Order also requires Beverly to provide backpay, reinstatement, and other relief to all employees who were adversely affected, and to post and abide by a notice of these requirements at all Beverly nursing homes nationwide.

Specifically, the NLRB has found that we violated the employee rights described below at a number of nursing homes in Pennsylvania, and that we have done so repeatedly at numerous other nursing homes.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse union representatives access to nursing homes as required pending the negotiation of a new collective-bargaining agreements(s).

WE WILL NOT refuse to allow posting of union-related notices on bulletin boards in nursing homes as required pending the negotiation of a new collective-bargaining agreement.

WE WILL NOT lay you off without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT adopt health insurance plans for employees without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT reduce your hours of work or overtime opportunities without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT require you to return home and retrieve your identification badges before permitting you to work without affording your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT eliminate bargaining unit positions or assign unit work to nonunit employees without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT require you to work overtime or eliminate your opportunities for voluntary overtime without affording your bargaining representative adequate prior notice and opportunity for bargaining.

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[4] I agree with the judge's finding, in sec. VII of his decision, that the extensions of strike notices on the part of the Union satisfied the requirements of Sec. 8(g), but only because of the well-established Board precedent, cited by the judge, which has apparently not been questioned in any court decisions.

I find sec. X of the judge's decision, titled "Overview," gratuitous and I do not rely on it.

I agree with my colleagues that a corporatewide order is appropriate here. However, I would limit notice posting to those facilities at which the instant unfair labor practices occurred. Otherwise, unaffected employees would be exposed to a remedial notice.

[5] See *Detroit Newspapers,* supra; *Service Electric Co.,* 281 NLRB 633 (1986).

WE WILL NOT fail to give your bargaining representative adequate prior notice and opportunity for bargaining before changing any employee's other contractual terms and conditions of employment, including: work schedules and related advance-posting requirements; absentee policies; requirements for doctor's certification for absences for illness; rules related to vacation scheduling and duration; and job descriptions.

WE WILL NOT fail to honor union requests to bargain over changes in terms and conditions of employment.

WE WILL NOT bypass your union representative and deal directly with you.

WE WILL NOT fail to comply with union requests for information the Union needs to carry out its responsibilities as your collective-bargaining representative.

WE WILL NOT fail to process grievances in a timely manner.

WE WILL NOT change job descriptions without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT change bargaining unit work and vacation schedules without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT refuse to respond to information requests from your bargaining representative related to changes in job descriptions and job responsibilities; WE WILL NOT refuse to bargain with your bargaining representative over such changes; and WE WILL NOT deal directly with you concerning such changes.

WE WILL NOT change employees' job descriptions in retaliation for your supporting a union.

WE WILL NOT engage in or threaten you with unlawful surveillance, including videotaping, of your union or protected concerted activities.

WE WILL NOT change the break schedules of union supporters to inhibit your ability to engage in union activities.

WE WILL NOT solicit you to resign from union membership, interrogate you about your willingness to strike, or threaten you with reduced hours if you engage in a strike.

WE WILL NOT reduce your work hours to discourage you from supporting a union.

WE WILL NOT threaten you with discipline and discharge for supporting Unions or for complaining about working conditions.

WE WILL NOT attempt to intimidate you by threatening to grant wage increases to replacement workers in the event of a strike.

WE WILL NOT attempt to dissuade you from supporting a union by soliciting and implicitly promising to remedy your grievances.

WE WILL NOT disparage you if you engage in the protected concerted action of protesting unfair working conditions by calling you insulting or obscene names or by using other derogatory language.

WE WILL NOT prohibit you from leaving union literature in the breakroom, or prematurely remove such literature, and WE WILL NOT prevent you from selling union insignia at offduty times in the breakroom.

WE WILL NOT refuse to allow duly selected employee union representatives to attend labor-management meetings or otherwise prevent them from carrying out their duties as union representatives.

WE WILL NOT fail to reinstate employees who participate in unfair labor practice strikes immediately when they unconditionally offer to return to work.

WE WILL NOT discharge or suspend employees represented by a union without giving the Union the required timely notice.

WE WILL NOT change employees' morning or afternoon breaktimes to prevent them from meeting with other employees or from engaging in other union-related activities.

WE WILL NOT reduce employees' working hours for serving on union negotiating committees or for engaging in other union activities.

WE WILL NOT discharge or suspend employees in retaliation for attending union meetings, hosting union meetings in their homes, participating in union protest marches, wearing union buttons and insignia, serving on union negotiating committees, urging other employees to support the Union during an impending strike, or actively supporting unionization, or to deter other employees from engaging in such union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to their former jobs to all employees who participated in the unfair labor practice strike which commenced on April 1, 1996, in Pennsylvania, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make those employees whole, with interest, for any loss of earnings or other benefits suffered as a result of our discrimination against them for their union or protected concerted activity.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to their former jobs to Irene Susman and Blanche Lyons at Beverly

Manor of Monroeville; Dan Bump and Julie Whitman at Meadville Care Center; Helen Ressler at Murray Manor; Karen Berkey and Judy Grech at Richland Manor; and Joy Kahly at William Penn Nursing Center; and on request restore the 8 a.m. to 4 p.m. shift of Barbara Glancey at Meadville Care Center, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make Irene Susman and Blanche Lyons at Beverly Manor of Monroeville; Dan Bump and Julie Whitman at Meadville Care Center; Helen Ressler at Murray Manor; Karen Berkey and Judy Grech at Richland Manor; and Joy Kahly at William Penn Nursing Center whole for any loss of earnings or other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to their former jobs to Sharon Proper at Grandview Health Care; Diane McNulty at Haida Manor; and Sara Sharbaugh at Haida Manor, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Sharon Proper at Grandview Health Care; Diane McNulty at Haida Manor; and Sara Sharbaugh at Haida Manor whole for any loss of earnings or other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL make Connie Kollar at Haida Manor whole for any loss of earnings or other benefits resulting from her our unlawful suspension of her for union activity, less any net interim earnings, plus interest.

WE WILL, on request, restore the pre-January 1996 morning and afternoon breaktimes of Ruth Pilarski at William Penn Nursing Center; and restore the pre-January 1996 working hours of Beverly Higbee at Grandview Health Care, without prejudice to their seniority or other rights or privileges previously enjoyed. WE WILL make them whole for any loss of earnings or other benefits suffered as a result of our discrimination against them for their union activity.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful failure to rehire each employee who participated in the unfair labor practice strike which commenced on April 1, 1996; to the unlawful discharges of Sharon Proper, Diane McNulty, and Sara Sharbaugh; to the unlawful suspension of Connie Kollar; to the unlawful change of breaktimes for Ruth Pilarski; and to the unlawful reduction of the working hours of Beverly Higbee and, WE WILL within 3 days thereafter, notify each of these employees in writing that this has been done and that the unlawful action will not be used against him or her in any way.

WE WILL, on request, rescind all unilateral actions found to have been affected in violation of our collective bargaining obligations or as a result of unlawful discriminatory actions, and WE WILL make any employee adversely affected by those actions whole for any loss of earnings and other benefits suffered as a result, less any net interim earnings, plus interest.

WE WILL provide the Union and its appropriate local unions notice and an opportunity to bargain over any prospective changes in rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL, on the Union's request, provide any requested information that is necessary and relevant to the Union's statutory duties and responsibilities as collective-bargaining representative of the Respondent's employees.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

This Notice has been posted as a result of a long series of cases brought by various Unions and individuals against Beverly before the National Labor Relations Board. In these cases the NLRB, based on Beverly's recurring violations of the National Labor Relations Act, issued an order requiring Beverly to cease and desist from committing such unlawful conduct, not only at the nursing homes which were involved in the proceedings, but also at all other Beverly nursing homes and offices. The NLRB's Order also requires Beverly to provide backpay, reinstatement, and other relief to all employees who were adversely affected, and to post and abide by a notice of these requirements at all Beverly nursing homes nationwide.

Specifically, the NLRB has found that we violated the employee rights described below at a number of nursing homes in Pennsylvania, and that we have done so repeatedly at numerous other nursing homes.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT, if you are represented by a union, refuse union representatives access to nursing homes as required pending the negotiation of a new collective-bargaining agreements(s).

WE WILL NOT, if you are represented by a union, refuse to allow posting of union-related notices on bulletin boards in nursing homes as required pending the negotiation of a new collective-bargaining agreement(s).

WE WILL NOT, if you are represented by a union, lay you off without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT, if you are represented by a union, adopt health insurance plans for employees without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT, if you are represented by a union, reduce your hours of work or overtime opportunities without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT, if you are represented by a union, require you to return home and retrieve your identification badges before permitting you to work without affording your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT, if you are represented by a union, eliminate bargaining unit positions or assign unit work to nonunit employees without affording to your bargaining representative adequate prior notice and opportunity to bargain.

WE WILL NOT, if you are represented by a union, require you to work overtime or eliminate your opportunities for voluntary overtime without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT, if you are represented by a union, fail to give your bargaining representative adequate prior notice and opportunity for bargaining before changing any employee's other contractual terms and conditions of employment, including: work schedules and related-advance posting requirements; absentee policies; requirements for doctor's certification for absences for illness; rules related to vacation scheduling and duration; and job descriptions.

WE WILL NOT, if you are represented by a union, fail to honor union requests to bargain over changes in terms and conditions of employment.

WE WILL NOT, if you are represented by a union, bypass your union representative and deal directly with you.

WE WILL NOT, if you are represented by a union, fail to comply with union requests for information the Union needs to carry out its responsibilities as your collective-bargaining representative.

WE WILL NOT, if you are represented by a union, fail to process grievances in a timely manner.

WE WILL NOT, if you are represented by a union, change job descriptions without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT, if you are represented by a union, change bargaining unit work and vacation schedules without affording your bargaining representative adequate prior notice and opportunity for bargaining.

WE WILL NOT, if you are represented by a union, refuse to respond to information requests from your bargaining representative related to changes in job descriptions and job responsibilities; WE WILL NOT refuse to bargain with your bargaining representative over such changes; and WE WILL NOT deal directly with you concerning such changes.

WE WILL NOT change employees' job descriptions in retaliation for your supporting a union.

WE WILL NOT engage in or threaten you with unlawful surveillance, including videotaping, of your union or protected concerted activities.

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WE WILL NOT reduce your work hours to discourage you from supporting a union.

WE WILL NOT threaten you with discipline and discharge for supporting Unions or for complaining about working conditions.

WE WILL NOT attempt to intimidate you by threatening to grant wage increases to replacement workers in the event of a strike.

WE WILL NOT attempt to dissuade you from supporting a union by soliciting and implicitly promising to remedy your grievances.

WE WILL NOT disparage you if you engage in the protected concerted action of protesting unfair working conditions by calling you insulting or obscene names or by using other derogatory language.

WE WILL NOT prohibit you from leaving union literature in the breakroom, or prematurely remove such literature, and WE WILL NOT prevent you from selling union insignia at off-duty times in the breakroom.

WE WILL NOT, if you are represented by a union, refuse to allow duly selected employee union representatives to attend labor-management meetings or otherwise prevent them from carrying out their duties as union representatives.

WE WILL NOT fail to reinstate employees who participate in unfair labor practice strikes immediately when they unconditionally offer to return to work.

WE WILL NOT discharge or suspend employees represented by a union without giving the Union the required timely notice.

WE WILL NOT change employees' morning or afternoon breaktimes to prevent them from meeting with other employees or from engaging in other union-related activities.

WE WILL NOT reduce employees' working hours for serving on union negotiating committees or for engaging in other union activities.

WE WILL NOT discharge or suspend employees in retaliation for attending union meetings, hosting union meetings in their homes, participating in union protest marches, wearing union buttons and insignia, serving on union negotiating committees, urging other employees to support the Union during an impending strike, or actively supporting unionization, or to deter other employees from engaging in such union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the discharges of all employees who participated in the unfair labor practice strike which commenced on April 1, 1996, in Pennsylvania.

WE WILL, within 14 days from the date of the Board's Order, rescind all the discriminatory discharges, suspension, and other actions we took against employees for their union activity; WE WILL rescind all the unilateral changes in terms of employment and working conditions we made without giving the Union notice and opportunity to bargain; WE WILL, within 14 days from the date of the Board's Order, offer each of the employees who were affected by this discrimination or by these unilateral changes full reinstatement to their former jobs or their former terms of employment, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make each of these employees whole, with interest, for any loss of earnings or other benefits resulting from our unlawful actions.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the discriminatory discharges, suspensions, or other actions affecting these employees; WE WILL provide the Union an opportunity to bargain over any prospective changes in rates of pay, wages, hours, and other terms and conditions of employment; and WE WILL, on the Union's request, provide any information that would be necessary and relevant to the Union's statutory responsibilities as collective bargaining representative of our employees.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC.

JoAnn F. Dempler, Dalia Belinkoff, and *Julie Stern, Esqs*., for the General Counsel.

Hugh Reilly and *Donald L. Dotson, Esqs*., of Fort Smith, Arkansas, and *Warren M. Davidson* and *Thomas P. Dowd, Esqs. (Littler, Mendelson, Fastiff, Tichy & Mathiason, P.C.*), of Baltimore, Maryland, for the Respondents.

Timothy Sears, Esq., for the Charging Unions.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. These cases were tried at six locations in Pennsylvania (Scranton, Franklin, Harrisburg, Pittsburgh, Johnstown, and Reading), on 20 days between July 15, 1996, and May 6, 1997.

The original charge was filed on February 13, 19961 by District 1199P, Service Employees International Union, AFL–CIO, CLC (SEIU). Thereafter, numerous additional charges2 were filed by that Union and by two other SEIU affiliated unions (Locals 585 and 668). A consolidated complaint against the captioned Respondents issued on May 9 and this was succeeded on June 19 by an amended consolidated complaint, and the latter was amended up to and through conclusion of hearings.3

At issue is whether Respondents violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by unilaterally changing terms and conditions of employment, by: refusing the Unions' information requests, refusing to bargain over specific issues, delaying grievance processing, and by-passing the Locals and dealing directly with employees. Also, there are numerous allegations of coercive and discriminatory conduct in violation of Section 8(a)(1) and (3) of the Act, including failing promptly to reinstate approximately 450 employees who engaged in a 3-day strike beginning on April 1.

On April 4, 1997, the United States District Court for the Western District of Pennsylvania in *Kobel v. Beverly Health and Rehabilitation Services, Inc.* (No. 96-1280), a proceeding brought by the Board under Section 10(j) of the Act, ordered reinstatement of the strikers and union access to

[1] All dates are in 1996, unless otherwise indicated.

[2] 6–CA–28061, 6–CA–28073, 6–CA–27874, 6–CA–28046, 6–CA–28075, 6–CA–27875, 6–CA–28049, 6–CA–28074, 6–CA–27876, 6–CA–28013, 6–CA–28050, 6–CA–27877, 6–CA–28014, 6–CA–28015, 6–CA–27878, 6–CA–27996, 6–CA–28020, 6–CA–28054, 6–CA–27879, 6–CA–28019, 6–CA–28047, 6–CA–27880, 6–CA–28023, 6–CA–28045, 6–CA–27881, 6–CA–28024, 6–CA–28057, 6–CA–27882, 6–CA–28025, 6–CA–28052, 6–CA–27883, 6–CA–28026, 6–CA–28051, 6–CA–27884, 6–CA–28058, 6–CA–28076, 6–CA–27889, 6–CA–28012, 6–CA–28059, 6–CA–27890, 6–CA–28048, 6–CA–27891, 6–CA–27892, 6–CA–28060, 6–CA–28077, 6–CA–27893, 6–CA–28079, 6–CA–27894, 6–CA–28053, 6–CA–28081, 6–CA–27895, 6–CA–27896, and 6–CA–28082.

[3] In its brief the General Counsel seeks further to amend the complaint to delete par. G6 and to include four additional charges. Respondents opposed the latter. The requested deletion is granted. Inclusion of additional charges is denied. No adequate reason is advanced as to why inclusion was not sought before close of the hearing. Failure to do so precluded Respondents from responding either at trial or on brief. In any event, procedural fairness would require reopening for that purpose and I see no compelling need for the attendant delay in disposition of these proceedings. *United Artists Theater*, 277 NLRB 115, 130 (1985).

bulletin boards as of May 5, 1997, subject to a proviso that the order will expire 6 months from April 1, absent my decision within that period. On request of the General Counsel, the Court on October 3 extended the deadline for 60 days.

Resolution of whether the various "Beverly" companies constitute a single entity such that a single-remedial order can and should issue against all of them has been deferred for resolution in a subsequent proceeding in a "bifurcating" order issued by me on May 1, 1997.4 Accordingly, unless otherwise indicated, the term Respondents in this decision refers only to the two Beverly Companies directly responsible for operations in the particular nursing homes at which violations are alleged to have occurred. Admittedly, these are Beverly Health and Rehabilitation Services, Inc. (BHRI), headquartered at Ft. Smith, Arkansas, which operates 6 of the homes, and its wholly owned subsidiary, Beverly Enterprises—Pennsylvania, Inc. (BE-P), with headquarters in Leesburg, Virginia, which operates 14.

On the entire record,5 including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondents are part of a corporate group which operates approximately 950 nursing homes throughout the Nation. As pertinent to these proceedings, they operate numerous homes in Pennsylvania, deriving therefrom $500,000 or more annually in gross revenues. They admit (and I find) that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

A threshold issue concerns Respondents' affirmative defense that consolidation of these cases violates: (a) casehandling rules and precedents and (b) provisions of a "standstill" agreement negotiated with the General Counsel. As to (a), I find sufficient commonality of issues and parties to warrant consolidation. Among other things, the alleged unilateral actions and strike involved most of the nursing homes, while the local unions are SEIU affiliates and Respondents allegedly constitute a single employer. As to (b), the agreement expressly provides for expiration by either party on 10 days' notice. The General Counsel availed himself of that provision and terminated the agreement by letter dated April 26. Respondents do not dispute receiving that notice 10 days before issuance of the consolidated complaint on May 9. Accordingly, the agreement plays no role in these proceedings. I reaffirm my earlier ruling striking the affirmative defense.

II. BACKGROUND

Each of the 20 nursing homes involved herein6 have bargaining units of service and maintenance employees, including certified nurses assistants (CNAs), and 9 also have units composed of licensed practical nurses (LPNs), and (with the exception of *York*7) each has its own collective-bargaining agreement(s). In all instances, the agreements are signed "BE-P doing business as" one of the 20 individually named nursing homes. Two agreements, each pertaining to service and maintenance employees at Grandview and Lancaster, respectively, expired on December 31, 1994. Agreements at the 18 other facilities expired on November 30, 1995. The latter were all signed for BE-P by its Regional Director of Associate Relations for the Northeast Region Wayne Chapman.

III. ALLEGED BARGAINING VIOLATIONS

A. Unilateral Actions

1. Overview

Shortly after the November 30, 1995, expiration date and while bargaining for new contracts continued, Respondents allegedly pursuant to directives from Chapman unilaterally (i.e., without giving the Unions notice and opportunity to bargain) implemented changes in terms and conditions of employment of in the following areas: dues deductions, union access, bulletin board notices, health care insurance, hours of work, and in "other" areas.

The Board and the courts have held, with a few exceptions, that terms and conditions of employment embodied in a collective-bargaining agreement remain in effect following the expiration of the contract. Such terms and conditions may not be modified without bargaining and the parties either reaching agreement or coming to impasse. *NLRB v. Katz*, 369 U.S. 736 (1962); *Luden's Inc. v. Bakery Workers Local 6,* 28 F.3d 347 (3d Cir. 1994); *Champion Parts Rebuilders v. NLRB*, 717 F.2d 845 (3d Cir. 1983); *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874 (3d Cir. 1968); *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). This principle is generally applicable to each of the unilateral changes at issue herein. Those changes will be considered seriatim with a view to determining whether exceptions apply.

2. Dues deductions

Each of the 18 contracts that expired November 30, 1995, contained union-security clauses and dues-checkoff authorizations. Prior to expiration of those contracts, Respondents deducted union dues from the employees' paychecks and remitted them to the appropriate local union. Pursuant to a written directive from Chapman, dated December 7, 1995, all deductions and remittances promptly ceased at the 18 facilities.8 This was done even though none of the affected bargaining unit employees had revoked dues-checkoff authorizations they had previously executed.

The Board uniformly has held that an employer's duty to check off and remit union dues is a creature of the existing contract which expires on termination of the underlying collective-bargaining agreement. As stated in *Bethlehem Steel Co. (New York, N.Y.),* 136 NLRB 1500, 1502 (1962) (emphasis added):

> The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a

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[4] After citing the District Court's deadline, the Bifurcating Order goes on to state:

> *And it further appearing*: That presentation of evidence on the single employer issue may "require several weeks" [General Counsel's estimate] of hearing time on a matter involving refinement of remedy rather than the basic question presented in these proceedings and to the Court (i.e. whether unfair labor practices were perpetrated and, if so, remedied at least by normal procedure), That there is an overriding need for expedited disposition of the ULP allegations, That the extraordinary remedies sought present clearly severable issues which can be resolved in a supplementary hearing and decision after the ULP and normal remedy determinations are made (see, *Le Rendezvous Restaurant,* 323 NLRB [445] at fns. 2 and 3 (1997 as reissued April 18)), And that Respondents will have opportunity promptly to appeal any adverse findings on those determinations and later, if necessary, to contest need for extraordinary remedies . . . .

No request to appeal the Order was filed.

[5] The all-party joint motion to correct the transcript, dated July 16, 1997, is granted and received in evidence as Jt. Exh. 3.

[6] Beverly Manor of *Monroeville, Clarion* Care Center, *Fayette Health* Care (Uniontown), *Franklin* Care Center (Waynesburg), *Grandview* Health Care (Oil City), *Haida* Manor (Hastings), *Meadville* Care Center, *Meyersdale* Manor, *Mt. Lebanon** Manor, *Murray** Manor (Murrysville), *Richland* Manor (Johnstown), *William Penn** Nursing Center (Lewistown), Beverly Manor of *Reading* (Mt./ Penn), Beverly Manor of *Lancaster,* Blue Ridge** Haven Convalescent Center (Camp Hill), *Caledonia* Manor (Fayettsville), *Camp Hill* Care Center, *Carpenter* Care Center (Tunkhannock), *Stroud** Manor (Stroudsburg), *York* Terrace Nursing Center (Pottsville). *Asterisks indicate facilities operated by BHRI rather than BE-P.*

[7] The LPN unit at *York* was certified on August 27 and the Board upheld the certification on September 23. However, no collective-bargaining agreement had been reached as of the time of close of hearings herein.

[8] Although Respondent had previously ceased deducting dues at *Grandview and Lancaster* on the expiration of their contracts on December 31, 1994, that unilateral change is not included within the instant complaint apparently because no charge was filed within 6 months of the cessation.

> union security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. . . . *The union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remain in force.*

See also *Robbins Door & Sash Co.,* 260 NLRB 659 (1982); *Ortiz Funeral Home Corp.,* 250 NLRB 730, 731 fn. 6 (1980); *Trico Products Corp.,* 238 NLRB 1306, 1308–1309 (1978); *Aerospace Workers, District No. 15*, 231 NLRB 602, 603 (1977). Further, in its most recent case addressing the issue, the Board adhered to precedent and held: "an employer's duty to check off and remit union dues is extinguished upon the expiration of the collective bargaining agreement." *87-10 51st Avenue Owners Corp*., 320 NLRB 993 (1996). In light of these precedents, allegations in the complaint regarding dues-checkoff will be dismissed.

In reaching that conclusion, I have considered and rejected the contention of the General Counsel and the Charging Unions that "previously decided case law is distinguishable from the instant case, or even incorrectly decided. I see no significant distinction; and, in this circumstance, any need for change in established law is a matter for the Board to decide. *Iowa Beef Packers,* 144 NLRB 615, 616 (1963).

3. Access

Each of the contracts requires Respondents to permit respective local union representatives reasonable access to the nursing homes. This right of access enabled them to meet with employees at the workplace in order to investigate grievances, to collect information related to collective-bargaining negotiations, and to generally deal with employee concerns. The access granted to union representatives was an existing term and condition of employment at the time of the expiration of the contracts. On expiration, Respondents were required to maintain the status quo until they fulfilled their bargaining obligations. See *West Lawrence Care Center*, 308 NLRB 1011, 1015 (1992); *T.L.C. St. Petersburg, Inc.,* 307 NLRB 605, 610 (1992); *Colonna's Shipyard,* 293 NLRB 136, 141 (1989); *Houston Coca-Cola Bottling Co.*, 265 NLRB 766, 777–778 (1992), enfd. in pertinent part 740 F.2d 398 (5th Cir. 1984).

Despite the provisions of the expired contracts, Chapman in the December 7, 1995 memorandum instructed facility administrators immediately to deny access to union representatives. At least 15 administrators complied,[9] and in some cases they summoned police to evict reluctant union agents. Thereafter, those administrators continued to deny union representatives opportunity to meet informally with employees at the workplace, and they were allowed entry only to attend specifically prearranged meetings with management.

These admitted actions constitute clear violations of Respondents' bargaining obligations under the cases cited above. In this instance, however, Respondents are the ones who urge a change of policy, arguing that the present law is inconsistent with rationales in subsequently decided cases involving related matters. Here too I decline to intrude on the Board's prerogatives.

I find that the denial of access to union representatives at the 15 facilities violated Section 8(a)(5) and (1) of the Act, as alleged.

4. Bulletin boards

Each of the contracts provides that Respondents will make a bulletin board available to the union representing employees at each home. The Locals made frequent use of the bulletin boards in order to communicate with the represented employees on a day-to-day basis. As with access rights, provisions in collective-bargaining agreements for use of bulletin boards for union postings became "terms and condition of employment" by virtue of inclusion in bargaining agreements, such that upon the expiration of the agreements, an employer is required to maintain the status quo until fulfilling its bargaining obligations. See *West Lawrence Care Center,* 308 NLRB 1011, 1015 (1992), supra; *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991); *Pioneer Press*, 297 NLRB 972, 983–984, 987–988 (1990).

Accordingly, removal of the bulletin boards and/or union-related items posted thereon at 16 of the homes10 that occurred on receipt of Chapman's December 7 directive, unilaterally changed the existing bulletin board practice in violation of Section 8(a)(5) and (1), as charged.

5. Health insurance

Contract provisions also require Respondents to offer an HMO as an alternative to the Beverly medical plan. Following the execution of the most recently expired contracts, a dispute arose over the circumstance that no HMO was conveniently located for employees at *Clarion, Fayette, Franklin, Meadville,* and *York*. That controversy was resolved by a grievance settlement in late 1994 which provides that Local 1199P's Health and Welfare Fund would be made available to employees at the five facilities. Paragraph 3 of the settlement states:

> The parties agree that the 1199P Health and Welfare Fund shall be a provider for a minimum period of one year under the term of the current collective-bargaining agreement at each above named facility. Such participation will automatically cancel unless the parties agree to extend such participation through future collective-bargaining negotiations.

That language unequivocally rebuts the general presumption that terms and conditions of employment established by an expired contract continue absent agreement after bargaining or impasse. Therefore, Respondents had a right to terminate the 1199P plan on November 30, 1995. However, they were not free thereafter unilaterally to implement a replacement plan in the face of a timely union request for bargaining on the matter. *Carpenter Sprinkler Corp.*, 238 NLRB 974 (1978), enfd. in pertinent part 605 F.2d 60 (2d Cir. 1979). The situation is akin to direct dealing with represented employees, albeit by—adding benefits. *Martin Marietta Energy Systems*, 283 NLRB 173, 175–176 and fn. 19 (1987) enfd. mem. 842 F.2d 332 (6th Cir. 1988); *St. Vincent Hospital*, 320 NLRB 42 (1995).

Here, a request for bargaining was made by District 1199P in a letter dated December 5. Therein, Union President DeBruin, after noting that he had received no response to his request for continuation of coverage under its Health and Welfare Fund, went on to state [emphasis added]:

> . . . I understand from concerned employees that the Company has unilaterally announced the discontinuation of current coverage and has threatened employees in some facilities with loss of medical coverage unless they agree to sign up for plans that are being unilaterally presented to employees without any negotiations with the Union. Let me state the obvious, the Union considers this to be a clear violation of your duty to bargain in good faith over these matters! We will be immediately filing grievances in each facility, as well as unfair labor practice charges. We demand that you bargain in good faith over *these issues*, and we will be demanding that you make any and all employees whole over any losses as the result of your actions.

Respondents, through Chapman, promptly rejected the request and proceeded to implement the replacement HMO plan on January.11 In doing so, they ignored their obligation to bargain in violation of Section 8(a)(5) and (1). As to discontinuance of the 1199P Plan, I find no violations in light of the agreed-to expiration date, and allegations with respect thereto will be dismissed.

6. Hours of work

Beginning on February 5, and continuing thereafter up to the strike, work hours of a number of unit employees (primarily in the laundry department) at 13 of the nursing homes were reduced. This was done by on recommendation from officials at Respondents' regional headquarters in Leesburg,

[9] Although administrators at *Mt. Lebanon* and *Haida* attempted to establish that access was denied because union representatives failed to give proper notice of his/her presence at those facilities or to provide an appropriate reason for access, it is clear that access was denied based on the corporate directive. Denial of access is not alleged with respect to the *Clarion, Franklin, Meyersdale, Murray, and Lancaster* nursing homes.

[10] Bulletin Board violations are not alleged to have occurred at *Meadville, Mt. Lebanon, Blue Ridge,* and *Carpenter*.

[11] Respondents view DeBruin's December 5 letter as requesting bargaining only in regard to continuation of coverage under the Union Health and Welfare Fund. However, in demanding bargaining on "these issues," the letter plainly refers to both the Unions' proposed continuation and new plans proposed by Respondents.

Virginia. Most of the reductions were due to implementation of an incontinence program under which disposable diapers ("Attends") replaced cloth ones, thereby reducing need for some laundry workers.12

Regardless of a company's motivation for a reduction of hours, it is axiomatic that an employer whose employees are represented for purposes of collective bargaining must bargain before changing hours of employment absent a waiver by the union. Specifically, Respondents were obligated to bargain over the effects of the implementation of the Attends incontinence program as well as other changes resulting in the reduction in hours. See *NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958); *Atlas Microfilming,* 267 NLRB 682, 695–696 (1983), enfd. 753 F.2d 313 (3d Cir. 1985). However, they are here shown to have implemented the Attends program and reduced the working hours of unit employees without giving prior notice to the Locals and without affording them opportunity for effects bargaining.13

Respondents contend they were freed of any obligation to bargain because the Unions waived their rights by agreeing to a broad management-rights clause contained in each of the expired contracts. Among other things, the clause gives Respondents the right to effect reductions in hours without bargaining provided reductions are made in accordance with seniority rules contained in the contracts.

A management-rights clause, while a contractually negotiated item, is not a term or condition of employment in the same sense as the traditional terms and conditions of employment such as wages or health benefits. To the extent that a management-rights clause authorizes unilateral action to change matters that are mandatory subjects of bargaining, it entails a union's waiver of its statutory right to bargain over those matters. *Holiday Inn of Victorville*, 284 NLRB 916 (1987). Waiver of such a right must be strictly construed; and the Board consistently has held that a waiver of bargaining rights under a management-rights clause does not survive the expiration of a contract. *Buck Creek Coal,* 310 NLRB 1240 (1993); *Control Services,* 303 NLRB 481 (1991), enfd. 975 F.2d 1551 (3d Cir. 1994), and enfd. 961 F.2d 1568 (3d Cir. 1992); *Kendall College of Art*, 288 NLRB l205, 1212 (1988).

Respondents also argue here, and in connection with other unilateral changes, that the Unions waived their rights by failing to request bargaining, citing cases that are inapposite either because management-rights (and complementary seniority) clauses were operative under unexpired contracts or where meaningful notice had been given *before changes were made.*

In these circumstances, I find that Respondents by unilaterally reducing hours at the 13 facilities violated Section 8(a)(5) and (1).14

7. Other unilateral changes

In addition to the unilateral changes identified above, Respondents made various other unilateral changes affecting service and maintenance unit employees, some of which also changed their terms and conditions of employment established by contract provisions.15 Like the unilateral changes discussed above, the ones cited herein were made without prior notice to the appropriate Local and without affording that union an opportunity to bargain. For the most part, the changes are not controverted by Respondents. Instead, as justification they point to the management rights clause in their expired contracts. That excuse fails for the reasons stated above in connection with reduced hours.

In particular, at *Monroeville*, Respondent BE-P implemented a new disciplinary policy for medication errors.16 At *Clarion*, it changed absenteeism policy and combined two unit positions in the dietary department into one new position. At *Fayette*, it changed policy with respect to requiring medical excuses following "calloffs," i.e., employees were asked to provide a doctor's excuse for 1-day instead of 3-day medical absences. At *Franklin*, it changed the scheduling of in-service meetings by requiring employees to attend those meetings during working hours instead of before or after the shift and it failed to post work schedules 2 weeks in advance as required by the contract. At *Grandview*, it changed rules relative to vacation scheduling and duration.

At *Meadville*, BE-P restructured its dietary department by changing job descriptions and ignored contract provisions by: failing to notify Local 585 of discharges,17 changing vacation and personal day policies and failing to post a new CNA position created in late February.18 At *Meyersdale*, it changed past practice with respect to scheduling of in-service meetings by requiring employees to attend during working hours. Past practice had been to combine several topics and hold a 1-hour in-service meeting for employees before or after shifts and pay overtime for attendance. This was changed to scheduling "mini" in-services on one or two matters during shifts, with no overtime.19

At *Richland*, BE-P admittedly eliminated the full-time position of activities aide and changed it to a part-time position, with attendant loss of benefits. At *Caledonia*, it changed practice with respect to the 2-week advance posting requirement in the contract relative to work schedules20 and assigned CNA unit work to nonunit employees, thereby reducing the size of the bargaining unit by three vacant CNA positions.21 At *Camp Hill*, it admittedly required employees to work mandatory overtime. At *York*, it altered overtime policy by removing unit employees who volunteered for overtime from the mandatory overtime rotation procedure set forth in the contract.22

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[12] The Attends program was responsible for reduced hours at 10 nursing homes: *Monroeville, Clarion, Fayette, Franklin, Haida, Mt. Lebanon, Murray, Richland, William Penn, and Camp Hill.* Other facilities at which hours of unit employees were reduced are: *Grandview, Lancaster, and Caledonia.*

[13] Although an administrator at the *Monroeville* facility notified Local 1199P of the Attends program, he did so on January 16—the day it was implemented. Another administrator (*Haida*) claims to have given advance notice to Local 585, but later admitted that the notice was sent after the implementation decision was made. Further, she admits to having sent the notice by mistake.

[14] The complaint also alleges employees at *Monroeville* were laid off "about January 16" as a result of implementation of the Attends program. While denying any layoffs in January, Respondents admit that Attends related layoffs occurred there in early February. I find the allegation sufficient to include the February layoffs, particularly since any Attends-based force reductions were unlawful. However, there is no showing that laid off laundry workers included Irene Susman and Blanche Lyons or that they or any other employees at *Monroeville* were denied bumping rights. Accordingly, allegations A18, 19, and 20 will be dismissed.

[15] Other allegations of unilateral changes and other unlawful actions specific to LPNs are considered in a separate subsection of this decision.

[16] In its brief BE-P claims the policy was a mere codification and not "new." However, the complaint allegation is admitted in its formal answer.

[17] I credit unrebutted testimony of Union Steward Nancy Huttlemayer that Local 585 was not given timely notice of discharges in December 1995 of two employees (Dan Bump and Julie Whitman) as required by the expired contract. However, since there is no evidence that was the case when another employee (Kelly Smith) was discharged, allegation G16(b) will be dismissed.

[18] The General Counsel claims that BE-P's interviewing applicants for bargaining unit positions in February also violated posting provisions. No definite hiring commitments appear to have been made, and it had a right to provide for personnel needs in the event of a strike.

[19] In this matter I have credited testimony of CNA Amiee Miller over that of Administrator Mike Walker, finding the former to be more candid and her testimony more detailed than the latter. In this regard, Walker apparently opted not to support his testimony with records which might have resolved conflicts.

[20] In response to Shop Steward Kauffman's grievance about this matter, facility administrator Spinazzola wrote: "[N]o violation has been made for the schedule is being posted in a time like manner [2 or 3 days in advance] and presently we are not honoring the two week posting for the union contract has still not been negotiated as of this date."

[21] I find credible and accept the steward's testimony that Spinazzola told her that she (Spinazzola) had directed LPNs and RNs to do CNA work in response to her (Kauffman's) complaint about short staffing.

[22] Administrator Postupak admits that the change varied from procedure required under the contract but claims she did so on an "experimental" basis and only for a few weeks. Another alleged unlawful

At *Mt. Lebanon*, Respondent BHRI changed the name badge—time/keeping policy by requiring employees to present their name badges on reporting for work in order to punch in. Employees who forgot their name badges were required to return home to retrieve them and were docked for time missed. At *Murray*, it admittedly combined jobs in dietary and laundry departments and assigned a nonunit employee to do unit work in the laundry department.23 At *William Penn*, it permanently assigned many of the duties of a unit position (activities aide) to a supervisor, thereby effectively eliminating the aide position.24

Many of these "other" changes dealt with basic terms and conditions of employment and were therefore mandatory subjects of bargaining and some, like access for union representatives and bulletin boards, became terms and conditions of employment by being subject of contractual provisions that survived expiration of the contracts. By unilaterally effecting them, Respondents violated Section 8(a) (5) and (1).

B. Bargaining Requests

In a number of instances, unilateral changes followed or were accompanied by urgent requests for bargaining that, admittedly, were either rejected or ignored. Thus, at *Clarion* and *Fayette* the requests concerned implementation of the Attends program, At *Meadville* they were directed: (1) to workplace safety concerns arising out of fire at the facility, (2) to the transfer of an employee (Barbara Glancy) from an 8 a.m. to 4 p.m. shift to a newly created 5:30 p.m. to midnight shift, (3) to failure to return unit employees whose hours had been reduced (or who had been laid off) to their previous positions prior to hiring new employees for those positions, (4) reorganization of the dietary department resulting in changed job descriptions and hours of work, and (5) changes of policy concerning use of personal days and a change of the last day vacation days may be used each year from December 31 to December 15. Plainly, the changes involved terms and conditions of employment that, absent the expired management-rights clause, gave rise to bargaining obligations. *Detroit News*, 319 NLRB 262 (1995); *Legal Aid Bureau,* 319 NLRB 159 (1995). Accordingly, in failing to bargain on these matters, BE-P also violated Section 8(a)(5) and (1).

C. Direct Dealing

In mid-December 1995, the director of nursing (DON) at *Haida* (Lisa Sedlemyer) approached CNA Darlene Prosser (an employee represented by Local 585) while the latter was at work in a resident's room. She told her that management was trying to solve employee problems so as to avert a strike; and

demanded she asked Prosser, "[W]hat it would take" to achieve that result. Prosser volunteered that a pension plan and medical insurance would help as would "more hands on the floor." In response, Sedlemyer asked for suggestions in regard to staffing. Prosser offered several; and Sedlemyer recorded the answers on a clipboard. Sedlemyer had similar discussions with about 10 other CNA members of the bargaining unit.

In mid-December 1995, a reduced resident census created an over staffing problem at *Caledonia*. Administrator Maria Spinazzola resolved it by reducing the workday for all personnel at the facility by one-half hour, effective January 4. As applied to employees in dietary, laundry, and housekeeping departments, Spinazzola (in response to a grievance filed by Local 668) justified the reductions on the basis a consensus "vote" of those employees taken at the facility in December.25

In both instances, BE-P bypassed the appropriate Local and dealt directly with employees over terms and conditions of employment.

The Board has held that direct dealing need not take the form of actual bargaining. Rather, the issue is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode the union's position as exclusive representative. *Allied-Signal, Inc*., 307 NLRB 752, 753–754 (1992).

I find that in dealing directly with its employees, Respondent BE-P has denigrated the two Locals as collective-bargaining representatives of its employees and that this direct dealing constitutes a violation of Section 8(a)(5) and (1), as alleged.26

D. Information Requests

At various times since about October 1995, at six facilities, the appropriate Local made certain information requests to Respondent BE-P in relation to service and maintenance employees.

The Act imposes a basic duty on employers to provide information to a union, on request, which is relevant and necessary to the union's role in the bargaining process. The Board and the courts long have held that information concerning wage rates, job descriptions, and other information pertaining to employees within the bargaining unit is presumptively relevant. *Curtis-Wright Corp.,* 145 NLRB 152 (1963). Moreover, the standard for relevancy is a liberal, discovery type standard. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967).

While Respondent made no response (no timely response in some cases) to the requests at issue, it denies that any of them were "relevant and necessary" for performance of the unions' duty as collective-bargaining representative. Specifics concerning the requests are set forth below.

Following announcement of adoption of the Attends program, a representative of Local 1199P wrote separately to administrators at *Clarion* and *Fayette* asking for information relative to the goals of the program, data as to how it was to be implemented, and statistics relating to the experience of other BE-P homes where the program already had been implemented. The Local explained it needed the information:

> . . . to bargain over the program since you stated it is reducing bargaining unit positions. We also feel you will be creating health and safety issues for staff as well as residents.

The letters were never acknowledged and no information was provided.27

Shortly after BE-P admittedly reduced hours of work and laid off employees at *Grandview* and *Meadville*, Local 585, by separate letters dated January 18, requested information concerning the facilities' monthly patient census, monthly revenue expenditure reports, daily and monthly recorded staff hours, and proposed reductions for nonbargaining unit personnel. It did so expressly for purposes of bargaining about the reductions (layoffs).

Here too, the letters went unacknowledged and no information was provided.

Local 585 sent three other written requests for information to the *Meadville* administrator. In the first, dated January 11, it asked for "a copy of the complete 'Log of Injuries and Illnesses' (OSHA 200 Forms) or equivalent reports covering the years 1992 and 1993." On January 17, it requested access to a terminated employee's (Vicki Mumford) personnel file in connecting with a grievance investigation. In the third letter, dated January 29, it sought reports and investigations relative to a recent fire at the facility "in order to properly investigate a pending health and safety grievance." Admittedly, there was no response to the requests of January 11 and 29; and in connection with the January 17 request, BE-P denied timely access by not making the file available until May.

At *Carpenter*, a representative of Local 1199 (CNA Audrey Russell) asked management, in mid-December 1995, for absenteeism records after a number of unit employees had been written up for that infraction. Her purpose was to use the information in processing grievances. And in late January she requested information regarding the suspension of employee Sue Teetsel, including her personnel file and any written statements made concerning the incident. About a week later, not having received a reply, she approached Facility Administrator Jeff Rentner. The latter declined to provide any of the requested data because Corporate Personnel Director Wayne Chapman had told him, "[H]e could not give it to me, that it was personal."28 Admittedly, in both instances, the requested information was not provided.

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variance in overtime procedure, cited in T17(b) of the complaint, is not supported by substantial evidence and will be dismissed.

23 Although it is alleged that BHRI also failed to follow seniority rules in awarding jobs, evidence in that regard is sketchy and inconclusive. The allegation in J12 will be dismissed.

24 Also alleged (L16) as a unilateral change in a term and condition of employment at *William Penn* is the removal of pay telephones from nursing station areas. The phones were simultaneously relocated to the main lobby. I find no violation. The change was not sufficiently significant to create a bargaining obligation (*Peerless Food Products*, 236 NLRB 161 (1978)); and there is no allegation that it was retaliatory.

25 The Local won the grievance and unit employees were given backpay.

26 The allegations, though formally denied, are not contested.

27 Although the answer denies that *Fayette* was requested to furnish the information, the evidence clearly shows that request was made.

28 In an apparent effort to explain Chapman's comment, Respondents argue on brief that the information sought was personal and confiden-

The contract at *York* requires BE-P to post an updated seniority list on the union bulletin board every 3 months with copies sent to the Local at the time of posting. Local 1199P uses the list for, among other things, ascertaining whether mandatory overtime is being assigned in accordance with seniority provisions. Not having received lists for September 30, 1995, and December 15, 1995, Local Representative Alan Silberman on January 15, reminded management of that circumstance and demanded a current list. Administrator Arlene Postupak provided the September 30, 1995 list a few weeks later. A current list was never provided.[29]

In November 1995, and again on December 18, 1995, Silberman requested *York* employee schedules, lists of mandatory overtime, and nursing hours recorded; stating that the information was for the dual purpose of enabling the Local to understand how mandatory overtime provisions in the contract were being administered and to monitor enforcement of a grievance settlement involving posting of full-time day-shift jobs. Admittedly, the information was never provided. In December 1995, January, and again in February, Local 1199P also requested copies of OSHA logs of Injuries and Illnesses (OSHA 200 Forms), logs that it routinely had requested and received in the past. The logs were not timely provided.[30] Finally, the "call list" pertaining to assignments of mandatory overtime in December 1995, was requested by Union Delegate Antoinette Bainbridge on January 15 for grievance processing purposes. Although the pertinent grievance was settled 2 weeks later, neither the call list nor an explanation was ever provided.

I find that the information sought in each of the described information requests pertains to terms and conditions of employment clearly relevant and necessary to the Unions' role in the bargaining process; that notwithstanding expiration of the contract BE-P had a continuing duty, absent impasse in negotiations, to provide that information or contemporaneously to request clarification of any perceived problem.31 It did neither. Accordingly, and in each instance, I find a violation of Section 8(a)(5) and (1), as alleged.32

E. Grievance Processing

The contracts each contain detailed grievance procedures. As to those, it is well established that an employer's obligation to process grievances thereunder survives expiration of a collective-bargaining agreement. *Days Hotel of Southfield,* 311 NLRB 856 (1993); *Beitler-McKee Optical Co*., 287 NLRB 1311, 1312 (1988); *Indiana & Michigan Electric Co*., 284 NLRB 53, 54 (1987).

Three grievance processing failures are alleged at *Franklin*.

The first entails a grievance allegedly filed "sometime" in February by a Local 585 representative (employee Shelley Kennedy) over termination of employee Shirley Wright. Although the Local promised additional evidence on the grievance and reserved exhibit number 266 for it, nothing was provided. Kennedy received no response,33 and she made no inquiry.

The second grievance, dated March 3, concerns an alleged failure to return moneys to union members following a decision not to implement a pension plan. Kennedy claims she left the grievance in the Office of Administrator Lou Ann Abbadini, but does not recall whether she left it with a secretary on simply left it there. Abbadini has no recollection of receiving the grievance. Here also, no response was forthcoming from the facility and Kennedy made no inquiry.

The third was filed on March 14 and pertains to disciplinary suspension of employee Cindy Connor. The response, although dated March 22, was not given to Kennedy until about April 18. Therein, Abbadini wrote: "File to be reviewed at corporate level." No disposition had been made by November 7 when the matter was the subject of testimony in this proceeding.

I am not persuaded that BE-P received the first or second grievance. As to the third, I decline to find that one instance of inordinate delay in processing grievances entails violation of a bargaining obligation. It is well established that a failure to take a required step is not a violation if it does threaten the overall grievance procedure. *Airport Aviation* Services, 292 NLRB 823, 830 (1989). The allegation of failure to meet with Local 585 to discuss grievances will be dismissed.

At *Meyersdale*, Local 1199P's representative, Tammy Miller, admittedly had no trouble in processing grievances at facility level (steps 1 and 2). However, she complains of delay in scheduling meetings to resolve them at the third or corporate level. She claims that prior to expiration of the contract on November 30, 1996, third-stage grievance meetings were held within 30 days of a request. Thereafter, one such meeting was held on May 22, and another (originally set for October 3) was reset for a day about 2 weeks after she testified on January 15, 1997. The May meeting resulted in disposition of 12 grievances, 2 of which had been pending third-stage review since about November 1995.

The allegation of refusal to process grievances will be dismissed. Apart from the two stated to have been filed in late 1995, there is no indication of when other grievances were filed, how many were filed and when requests were made for processing them to the third stage. With respect to the "other" grievances, there is no way to determine whether undue delay occurred. As to the two grievances that awaited 6 months for third-stage review, Union Representative Miller testified that a third-stage hearing had been set for "sometime" before January 29 but was postponed at her request; and it is not shown that BE-P was responsible for delay involved in the rescheduling to May 22.

At *Carpenter*, grievance processing at facility level continued without interruption after contract expiration, but Local 1199P Representative Alan Silberman experienced difficulty in arranging for third-step meetings at corporate level. He wrote to Labor Relations Manager Ronald St. Cyr on February 14 asking for an early meeting on "several" grievance appeals, including four that he specifically identified. In the past, meetings had been set within a month or 6 weeks of a request. No reply was received either to the letter or a number of phone calls to St. Cyr. He wrote again on March 25 and made followup calls. Again, he received no response. On April 10, he sent another letter in which he listed six specific grievances (including the four mentioned in his letter of February 14) ripe for third-stage review and asked for a meeting date. Thereafter, Silberman and St. Cyr contacted each other by telephone and they agreed to (and did) hold a 3-stage meeting on May 7.

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tial and that the request was denied to protect the privacy of grievant Teetsel. The argument is without merit. The Union admittedly represented Teetsel and acted on her behalf.

[29] Respondents' formal denial of the allegation that seniority lists were not provided apparently is based on employee/union delegate Anna Rokosky's testimony that she received lists on July 23. Besides the extensive and unexplained delay, no lists were sent directly to the Local contrary to prior practice under the contract. The delay and omission amount to a failure to respond, and I so find.

[30] As with the seniority lists, the OSHA logs were made available to Rokosky on July 23, with no explanation for the delay.

[31] Indicative of Respondents' attitude regarding union information requests after contract expiration is an inquiry an administrator appended to a union information request before forwarding it to Personnel Director Wayne Chapman at the Leesburg headquarters. The inquiry was made on April 5 and reads: "Is this what we were to be slow responding to?"

[32] I find no merit in Respondents' argument on brief that the Board is powerless to find a violation in connection with nonproduction of OSHA "200 Form" logs at *Meadville* because, assertedly, only OSHA can redress wrongful failure to provide access to the logs. Under OSHA regulations, the work-related injury/illness data on the forms is not confidential. Rather it is available to employees and their representatives on demand and access is not limited to entries that specifically relate to the employee seeking access. In this circumstance, the question is not whether the Board is attempting to enforce access. Rather, the data being relevant to safety in the workplace, BE-P was free to provide it to the employees' representative; and in choosing not to do so it violated the Act. In this regard, BE-P is shown to have routinely made the logs available to Local 1199P at *York* prior to contract expiration.

[33] The pertinent contract provision requires that grievances be acknowledged within 10 days of being filed.

In light of past practice, I find unreasonable BE-P's unexplained 3-month failure even to communicate in regard to Silberman's request for a third-stage hearing on the four grievances mentioned in his letter of February 14. This failure frustrated the bargained for grievance procedure in violation of Section 8(a)(5) and (1).

IV. ALLEGED RIGHTS' VIOLATIONS

Early in the afternoon of Sunday, March 31, and just prior to the strike, about 18 employees participated in leafleting on a road leading up to the *Fayette* facility. While doing so, two security guards approached the group. One of them told Union Organizer Tammy Miller that Administrator Jim Filippone wanted the group to move down the road because they were on facility property. As he did this, the other guard stood nearby busily engaged in videotaping the group. When Miller replied that they had a right to be there according to township records, the guards left to report back to Filippone. Later that day, Filippone, after obtaining clarification from township officials, told the employees that they need not move. The leafleting was peaceful. Filippone offered no explanation for the videotaping.

The Board has recognized that the public nature of union activity, which would permit an employer to lawfully observe the activity, does not authorize an employer to videotape the employees. *Fairfax Hospital*, 310 NLRB 299, 310 (l993) enfd. 14 F.2d 594 (4th Cir. 1993). Photographing employees engaged in lawful picketing tends to intimidate by implanting fear of future reprisals and is deemed surveillance violative of Section 8(a)(1), absent some legitimate justification. *Athens Disposal Co*., 315 NLRB 87 (1994); *Waco, Inc.*, 273 NLRB 746, 747 (1984). None is shown here. Accordingly, I find a violation.

In early March and in anticipation of the strike, BE-P admittedly advertised in local newspapers for replacement employees for *Grandview* and *Meadville*; and in the ads it offered them wage rates higher than those paid to unit employees at those facilities.34 In the context of the numerous instances of unlawful conduct found in this case, I regard the ads as an attempt to undermine the bargaining representative by threatening yet another unilateral action (raising wages) in the event employees chose to engage in the protected action of striking. See *Service Electric* Co., 281 NLRB 633 fn. 11 (1986). I find a violation of Section 8(a)(1), as alleged.

At *Haida*, the same facts were relied on to show direct dealing (supra, at 12) is relied on as also establishing solicitation of and an implied promise to remedy grievances in violation of Section 8(a)(1). Nursing Director Sedlemyer's question, "What would it take [to avert a strike] ?" and her follow-up request for suggested staffing changes clearly imply willingness to do what she could to remedy at least those grievances perceived to be legitimate. I find a violation. *Butler Shoes New York, Inc*., 263 NLRB 1031, 1033 (1982).

Two instances of unlawful surveillance are alleged to have occurred at *Haida*. The first was on December 2, 1995, when, beginning at 11 a.m., approximately 20 to 25 employees engaged in informational picketing in a public area in front of the facility. When CNA Ada Livingston went to the office that morning to deliver a message, she saw four supervisors35 observing the pickets through a window. Three were making notes and the fourth was videotaping the event.36 The second incident occurred on March 15, when about 25 employees led by Jenny Bush (a cook who also was president of the local union chapter), went to the office with a written 10-day strike notice. While Bush was attempting to present it to assistant Don Pietak, she observed Supervisors Shilling, Rake, and Paula Lloyd "writing down peoples' names."37

Here too, I find unlawful surveillance. There is no indication that employees' actions in either instance presented any threat of violence or disorder; and Respondent BE-P's representatives offered no explanation for the note taking and videotaping either at or around the time those actions were taken. Accordingly, I find them coercive in violation of Section 8(a)(1).

At *Meadville* on November 16, 1995, Administrator John Ferritto held a mandatory meeting with CNAs just after the 2 p.m. shift change. Approximately 25 gathered in the east wing lounge, including a number of CNAs who had not worked that day but came in (some with children) to get paychecks. The latter were told they could obtain checks that day only if they attended the meeting. A number of management personnel were also in the room, including DON Julie Walters, Assistant DON Judy Coleman, and Director of Staff Development Maria Brink.

The subject of the meeting, which lasted 1 hour, was a two-page letter dated October 27 sent to Labor Relations Director St. Cyr at BE-P's headquarters in Leesburg, Virginia, on behalf of otherwise unidentified "CNAs of Meadville." The letter indicates copies were sent to Personnel Director Chapman and the Pennsylvania Department of Public Health. The letter severely criticizes management of the facility for understaffing with consequent adverse affect on patient care and morale of employees, citing a number of examples. The tenor of the latter is seen from the following excerpt:

> Then you wonder why so many people call off? We are so physically and emotionally exhausted, if we didn't call off, we would probably end up being committed. You people are literally killing us, and you don't even care! What's worse, you don't appear to care about the residents! You treat us like the scum of the earth. You treat the residents like mindless objects with no feelings when you move them from room to room or wing to wing with no regard to what they prefer. You threaten us with more write-ups and wonder why you can't get help or new admissions.38

CNAs were given a copy of the letter as they entered the room and asked to read it. Later they were given a paper in which they were asked whether they "knew" about the letter and whether they agreed of disagreed with the contents. Some opted to respond, others declined.

Obviously angry and speaking in a loud voice throughout the meeting, Ferritto told the assembled CNAs that the letter "defamed" him; and, according to credited testimony of CNAs Nancy Huttlemayer and Dan Bump, Ferritto went on to call those responsible for the letter "assholes" and "fucking idiots." Also, he told them he was going to move his office to the breakroom to teach about how their representative (Local 585) misuses their dues and engages in libels which could result to diminished patient load and possible closure. In this regard, he referred to a letter sent to a local hospital on August 4 in which the Union discussed purported negative findings of an investigation into patient care at *Meadville*. Continuing, he cited grievance processing and other areas where Local 585 was not "properly" representing their interests; and, summarizing, he opined that those who continued to support the Local should "get Vaseline and bend over because you are going to get screwed."39

Ferritto explains that in calling the meeting he felt the two letters, particularly that of the CNAs "[coming] at the time of our contract expiring . . . [gave cause for] concerns regarding our day-to-day operations from both the financial aspect, as well as an emotional aspect."

The situation involves much more than Ferritto's expression of views concerning unions. On November 16, aware that the contract was likely to expire on November 30, Ferritto used the CNN letter (which dealt with complaints about "terms and conditions of employment") to convey to them that he, the top official of the facility, viewed their protected concerted activity and union involvement as the choice of "assholes and fucking idiots." By those epithets and the questionnaire, coming at a time when the Unions' ability to obtain a new contract was in doubt, Ferritto unlawfully sought to disparage employees from engaging in the protected concerted action of protesting perceived unfair working conditions in calling them "assholes and fucking idiots." I find such

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[34] The allegations, though admitted in Respondents' joint formal answer, are disputed in their brief with no request to amend the answer having been made—a situation replicated a number of times as to other allegations. In presenting the case, the General Counsel was entitled to rely on the admissions; and I have accepted them where, as here, there is an absence of clear and undisputed evidence to the contrary.

[35] Nancy Pietak (assistant director of nursing), Brenda Shilling (dietary service manager), Sandy Rake (activity director), and Bernice Yeager. Livingston also "believes" that DON Sedlemyer was there. In light of the latter's claim that she was not at the facility that day, I make no finding in that regard.

[36] It is undisputed that Pietak contemporaneously provided a handwritten listing of picketing employees to Facility Administrator Pauline Formack. None of the supervisors deny that videotaping occurred.

[37] Bush's testimony is not disputed by the supervisors.

[38] Ferritto claims to have first learned of the letter on the day prior to the meeting. However, a log kept by him (GC Exh. 94) shows that on or about the date the letter was sent he knew of the contents and that it was written by LPN Joyce Wiencek.

[39] Ferritto denies having used the described epithets but admits to using the words "damn," "shit," and the reference to vaseline. Asked at the meeting to watch his language because children were present, Ferritto replied: "I don't care, I'm pissed."

conduct violative of Section 8(a)(1), as alleged. *Sheraton Hotel Waterbury*, 312 NLRB 304, 338 (1993), enfd. in relevant part 31 F.3d 79 (2d Cir. 1994); *Hearst Corp*., 281 NLRB 764 (1986).

Also, I find in Ferritto's statement to the assembled CNAs that he was going to move his office down to the breakroom a threat of surveillance, as alleged.

On March 31, Local 1199P held a 10:30 to 11 p.m. candlelight vigil for *Meyersdale* CNAs at a parking lot located about a half mile from that facility. A local minister led the service, and the purpose was to prepare the CNAs for the strike scheduled for the next day. About 35 CNAs participated.

According to undisputed and credited testimony of a participant (CNA Amiee Miller), Facility Administrator Mike Walker and a security guard videotaped the vigil from Walker's parked tan station wagon as did security guards in two circling vans.

I find this a paradigm of intimidation through surveillance in violation of Section 8(a)(1).

On the same day, about 30 CNAs distributed leaflets on public property just outside the *Murray* facility. As they did so their activities were continuously videotaped by two security guards from points outside the facility in plain view. Here too, I have credited undisputed testimony of a participant (CNA Lanie Broome) and find unlawful surveillance.

As previously found, bulletin boards on which union materials had been posted pursuant to contract provisions were unlawfully removed at most of the facilities (including *Richland*) after issuance of Chapman's directive of December 7, 1995.

On January 23, a CNA (Margaret Pynkala) at *Richland* placed union literature on the table of the breakroom and also on the walls, lockers, refrigerator, and soda machine. These were promptly removed by Administrator John Poltrack. When Pynkala asked about the matter, he told her she would be disciplined if she continued to bring union literature into the building. On February 9, after other union-related material was removed from the breakroom, Pynkala and another CNA (Donna Zonts) approached DON Ron Lindrose, and he told them he was aware of Poltrack's prior warning and that he too would discipline Pynkala if she "continued to bring this union stuff into the building."

Employees have a protected right under Section 7 to distribute union-related material on an employer's premises during nonworking time and in nonworking areas. *McDonnell Douglas Corp*., 210 NLRB 280 (1974). Here, there is no indication that the union literature caused any significant disarray or damage to property; and, in this circumstance, I find the two blanket prohibitions and removal of literature from the breakroom violative of that right, as alleged.

Margaret Kephart, an employee in the housekeeping department at *William Penn*, knitted a variety of pin-on items and sold them to other employees in facility breakrooms. She had done so for over 5 years. The pins were fashioned in the shape of hearts, bunnies, shamrocks, and one type bore the legend "1199P Power." She carried them on her cleaning cart during the workday.

On February 26, the head of the housekeeping department (Roy King) passed by and noticed a number of "1199P Power" pins on her cart. Admittedly, he did not see her selling them. Nor did he ask if that was what she was doing or remind her of any rules against selling merchandise in patient care areas. He simply told her to "remove them, take them to her car." There is no indication that employees were prohibited from selling items at off-duty times in the breakroom. I conclude she was told to remove the items from the premises solely because he had happened to observe the union logo at a time when the contract had expired and tension about the Union was on the increase. I find his statement coercive in violation of Section 8(a)(1), as alleged. I find a similar violation when, also on that day, King admittedly and with no attempt at justification told an employee at the facility to remove union insignia. *St. Luke's Hospital*, 314 NLRB 434, 435 (1994).

On March 21, shortly before the strike, the dietary service manager at *William Penn* (Gwen Miller) called a cook (April Yoder) and dietary aide (Wanda Hetrick) into her office and after closing the door told them she could get in trouble for what she was about to do, but it was a way they could cross the picket line without being fined by their Union. She handed each of them an identical typewritten letter dated March 21 that reads as follows:

> District 1199P
>
> 1402 South Atherton St. Re: Resignation
> State College, PA 16801
>
> Dear Tom DeBruin,
>
> I, , am an employee of William Penn Nursing Center. Because the collective bargaining agreement has expired, and its union security provision is no longer in effect, I hereby resign from membership in the union and any and all of its affiliated labor organizations. This change is effective immediately. Any obligations to tender union dues, fees, and assessments are also terminated immediately and, as a nonmember, I am no longer subject to union fines, or assessments if I choose to cross a picket line or refuse to comply with other union rules governing members.
>
> Very Truly Yours,

and asked them to sign "right away" at the top and bottom. Then, according to Yoder: "[W]e asked if we'd be fired or anything [for not signing], and she [Miller] said no, you're a good group of girls. So of course, we didn't have time to read it, because she was real quick. Real quick, she was nervous. So we did sign . . . ." In a day or two, Yoder, Hetrick, and five other unit members signed and presented to Miller a petition in which they asked for return of the resignation letters and claimed they were signed under duress.

On March 25, Yoder saw Miller getting into her car at the facility parking lot and went over to her intending to ask permission to leave early for a doctor appointment. Seeing her, Miller held the steering wheel tightly and appeared upset. When Yoder asked what was wrong, Miller blurted out: "[Y]ou girls really hurt me bad. You can't believe what I tell you . . . our dietary will never be the same . . . you backstabbed me, you went behind my back and did this." Calming a bit, Miller asked: "Are you going to be striking?" Taken aback, Yoder replied: "I don't know." Miller turned, looked directly at her, and said: "I'll guarantee you one thing, if you do, you won't have the hours that you have when you come back." At that point, Miller shut the car door and drove away.[40]

I find coercive and unlawful, as alleged, Department Head Miller's: (1) March 21 solicitation of Yoder and Hetrick to resign from the Union (by signing the form they would be "good girls" with no need to fear for their jobs) and (2) March 25 interrogation as to whether Yoder would participate in the strike and threat to reduce her hours if she did so. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992).

At *Reading* on March 28, Administrator David Pool assembled a group of about 20 employees who were union members and, allegedly, prohibited them from talking about the Union and from wearing union stickers and buttons.

Testimony as to those allegations was elicited from CNA Melissa Putnam and RNA (restorative nursing assistant) Maria Pedraza. Putnam claims that Pool speaking in a loud voice:

> . . . explained to us that he was very upset about us going on strike and he didn't want us to talk about the union in any way, that he didn't want us talking about the union to the residents, to our family members, at home, or outside the facility in any way. And that if he found out that we did that we would be terminated . . . [also] He told us we had to take our buttons and stickers off immediately. That if we didn't, we could swipe [clock] out.

She removed a green sticker bearing the legend "Dignity, Rights & Respect." Initially, she did not recall having worn another sticker stating "Danger, Short Staffing," but at a later point she admits she and others wore those as well as one reading "Beverly, Law Breaker."

For her part, Pedraza states that Pool in a loud and degrading tone of voice:

> . . . gave several threats. He said we were not to talk union in the facility, out of the facility, or anywhere and if he found out we did, we would get reprimanded . . . [perhaps] suspended pending an investigation with possibility of termination . . . . [he also] said that we could not wear any union stickers or any union buttons or anything like that.

Pedraza claims she wore only a "Dignity" sticker that day and that she did not see any other employee wearing "Danger, Short Staffing" or "Beverly, Law Breaker" on March 28.

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[40] Miller denies that the described March 21 and 25 incidents occurred. I have credited Yoder, finding her a candid witness and her testimony replete with truth enhancing detail.

It is undisputed that prior to the meeting employees had been allowed to wear union buttons "Dignity" stickers in the facility, including resident care areas.

Pool explains that he called the meeting because over a 2-week period a few employees had worn "Danger, Short Staffing" and "Beverly, Law Breaker" stickers while on duty whereas he noticed everyone was wearing them that day; and because he considered the stickers defamatory. He claims he told the employees that he would not permit those stickers to be worn anywhere in the facility other than the breakroom. In addition, he told them they were not to discuss union matters on working time in resident care areas.

I am not persuaded that the two employees actually heard what they think they did. Crediting Pool, I find that he specifically identified the two "defamatory" stickers and told employees not to wear them at any place in the facility other than the breakroom and that he did not mention "Dignity" or other union-related insignia. I find nothing unlawful. Apart from the question of truthfulness, the offending stickers were of a type likely to cause unease among residents, *NLRB v. Baptist Hospital,* 442 U.S. 773, 784 (1979), quoting *Beth Israel Hospital. v. NLRB*, 437 U.S. 483, 505 (1978); *St. John's Hospital*, 222 NLRB 1150 (1976), affd. in relevant part 557 F.2d 1368 (10th Cir. 1977); and the limited prohibition on discussing union matters in the facility is not unduly restrictive. *Aroostock County Regional Ophthalmology Center*, 317 NLRB 218 (1996).

At *Caledonia* on February 6, a union shop steward (CNA Tena Kauffman) reiterated Zto facility administrator, Maria Spinazzola, a complaint that CNAs were "always being short staffed and needed more help." Spinazzola told her that because of the complaint she had directed RNs and LPNs to assist in performing CNA duties "when needed." Implementation of that directive previously has been found to be a unilateral change in violation of Section 8(a)(5). I also find that as communicated to Kauffman it constitutes an independent violation of Section 8(a)(1)—a threat of retaliation for voicing a complaint about working conditions.

V. ALLEGED DISCRIMINATIONS

On March 14 in the breakroom at *Haida* a number of employees (including laundry aide Connie Kollar and CNAs Lee Roundsley, John Katchmer, and Kathy Bernosky) were discussing need for union solidarity during the impending strike. Roundsley, a union member, said she intended to continue working and would cross the picket line if necessary. She claims that Kollar responded by "looking at me" and stating "If any of you people are thinking of crossing that picket line, you better watch your back." For her part, Kollar (supported by Katchmer) claims to have said, "You should think long and hard before you do that."

The Unions' original 10-day strike notices were sent to Respondents on March 15.

On March 20, Facility Administrator Pauline Formick approached Roundsley, explained that she had heard about a threat, and obtained Roundsley's version of the March 14 breakroom dialogue. Based on that interview, the statement of another (unidentified) employee who told her that Kollar threatened "to beat them up" and a directive from Personnel Director Wayne Chapman in Leesburg, Formick, on the following day, suspended Kollar "pending investigation" for threatening employees. Claiming the matter was "confidential," Formick refused to give Kollar any details including what she was alleged to have said, who was threatened, and where and when it occurred, thereby precluding any response. Four days later, "per Wayne Chapman," Kollar was recalled after being warned that any repetition would result in termination. She was not paid for the 4-day absence.

Prior to her suspension, Kollar openly distributed union fliers and prominently displayed a "We Want a Contract Now" sticker on her uniform. She was a long-term employees (10 years) and had never received any warnings or other discipline.

The basic question does not concern the credibility of Kollar vs. Roundsley. Rather, it is whether Formick would so readily have accepted Roundsley's account (an employee who evinced intent to cross a picket line) and have suspended Kollar based thereon absent the latter's known prounion stance. Having in mind the circumstances described above and BE-P's then ongoing and (as previously found) sometimes unlawful efforts to persuade employees not to strike, I conclude she (and Chapman) simply were not interested in making an impartial inquiry. Instead, they viewed the situation as an opportunity to intimidate Kollar and other union activists on the eve of the anticipated strike. I find the suspension discriminatory in violation of Section 8(a)(3) and (1), as alleged.

Two incidents of unlawful discrimination are alleged to have occurred at the *William Penn*.

The first involves Ruth Pilarski, a CNA since 1989 and long-term president of the facility chapter of Local 1199P. She regularly had her 15-minute morning break at 11 a.m. and took lunch and afternoon breaks when convenient to residents. This changed in January 1996 when Pilarski was told by her supervisor (Karina Law) to take breaks at set times: 11 a.m., and 3:30 p.m. Law also told her that thereafter she would be taking her breaks at the same time as Pilarski. Law told her the change was ordered by Facility Administrator Leroy Miller because "he had a hard time keeping track of where I was." Miller, however, testified that it was the supervisor who "on occasion" had difficulty locating Pilarski. The change affected Pilarski's ability to participate in union activity on her breaktimes, as her new afternoon breaktimes did not coincide with the other CNAs' breaks.

Taken together with the previously discussed unlawful denial of union access to the facility, removal of union notices from the bulletin board, BHRI's failure to provide specifics concerning purported past problems in locating Pilarski, and her status as the principal union representative at the facility, I find the change in her break schedule represents yet another example of management's effort to inhibit union communications with members after expiration of the contract. In this instance, the change constitutes unlawful discrimination against Pilarski in violation of Section 8 (a)(3) and (1).

The second alleged discrimination occurred at the *William Penn* facility, in January 1996, when Respondent BHRI admittedly reduced the working hours of all CNAs from 10 to 8 days per 2-week pay period without notice to or opportunity for bargaining with Local 1199P. That unilateral action is included as a violation of Section 8(a)(5) in my prior discussion, as are other such actions at other facilities when, as here, a contract violation is alleged. In addition, I find the reduction in hours, coming as it did shortly after expiration of the contract and accompanied by numerous other unlawful acts, also constitutes a discriminatory attempt to discourage continuing membership in the Union in violation of Section 8(a)(3).

VI. ACTIONS AGAINST LPNS

A. Alleged Bargaining Violations

At *Monroeville* and *Fayette* LPNs have been represented in their own unit by Local 1199P since 1987 under separate collective-bargaining agreements. Shortly after the agreements expired on November 30, 1995, Respondents' overall personnel manager (Wayne Chapman) sent a comprehensive written revision of the LPN role to, among others, administrators at the two facilities. The revision contained new job descriptions for LPNs that clearly made them statutory supervisors over CNAs; and in a related document, disciplinary policy was changed to provide for punishing LPNs for errors made by CNAs. Pursuant to Chapman's instructions the changes were made effective in January but assertedly only for newly hired LPNs.

These changes were implemented without bargaining or affording the Union an opportunity to bargain.[41] The claimed justification—the management-rights clause—did not survive expiration of the contracts, even assuming applicability. See *Buck Creek Coal* and other cases cited, supra at 8. Accordingly, Respondent violated Section 8(a)(5) of the Act; and, here, I find that implementation of the changed status on the heels of contract expiration and in light of concomitant unfair labor practices also entails discrimination against LPNs in violation of Section 8(a)(3).

Further, at *Fayette*, Respondent also violated Section 8(a)(5) by refusing to respond to the Union's February 1 request for information about the changes in LPN status, by admittedly refusing its request for bargaining about them and by admittedly dealing directly with LPNs regarding their changed job duties, all as alleged.

At *Grandview*, the LPNs were certified on March 11, 1994, and the Board upheld the certification on May 17, 1996. Respondent BE-P chose to test the certification by refusing to bargain. In a memorandum opinion in Docket No. 96-1406 issued on September 19, 1997, the U.S. Court of Appeals for the District of Columbia upheld the Board's determination that the LPNs were not supervisors and ordered enforcement. In choosing to treat LPNs as statutory supervisors while

[41] At *Fayette*, the LPNs were required to attend a meeting on January 15 in which they were instructed that they were, as of that time, supervisors, and were to sign papers indicating their acknowledgment of their changed status.

contesting the Board certification, Respondent acted at its own peril as to any interim unfair labor practices. *Livingstone Pipe & Tube,* 303 NLRB 873, 878-879 (1991), enfd. 987 F.2d 422 (7th Cir. 1993).

Respondent BE-P admittedly changed the hours of LPNs at *Grandview* in January and at various times thereafter. Also it canceled, albeit in anticipation of the strike, all employees vacations, personal/bonus days, and requested days off without pay until further notice. These actions were taken without notice and bargaining with the Union. Since the LPN unit had long been certified, it was under a clear obligation to bargain with respect to all aspects of their terms and conditions of employment. The unilateral reductions therefore were effected in violation of Section 8(a)(5).

Also charged is Montell's admitted refusal to allow a duly selected LPN (Sue Carbaugh) to serve as union representative at a labor-management meeting at Grandview set for January 30.42 Management had previous notice of her selection as union steward. In a letter dated February 1, Union Official Linda Love protested the refusal. The letter elicited no response. The refusal constitutes an interference with the Section 7 right of employees, acting through their union, freely to select their representatives for the processing of grievances, and discussion of workplace matters. *Missouri Portland Cement Co.*, 284 NLRB 432 (1987). Accordingly, I find a violation of its bargaining obligation under Section 8(a)(5).

B. Alleged Discriminations—Grandview

1. Higbee

By letter dated December 19, 1995, Local 585 advised *Grandview* Administrator Tamara Montell that LPN Beverly (Billie) Higbee was one of several facility employees who would represent the Union at bargaining sessions then set to begin on January 9.

On January 6, ADON Teresa Stack told Higbee that she would either be laid off or have her working hours reduced from 64 to 32 per 2-week pay period. At this time, there was a complement of 16 LPNs at the facility, Higbee ranked fourth in overall seniority. When she asserted her seniority, Stack said she would ask Montell. Shortly thereafter Montell approached Higbee and told her she would "call corporate" about the matter. Five days later (January 11), Stack told Higbee that management had decided immediately to reduced her hours to 32 per pay period and that in reaching the decision "they" had considered job performance as well as seniority. Higbee was never told about any deficiency in her work. In fact, in all of her previously issued written evaluations going back to 1989 her performance were rated either outstanding or very good. At the time two other LPNs (both with less seniority than Higbee) were placed in layoff status and another two had their hours reduced.43

In these circumstances, having in mind Respondent's previously discussed (in subsec. III) contemporaneous denial of union access to the *Grandview* facility (including its bulletin board), failure to provide relevant information requested by Local 585 and unilaterally curtailing working hours of a number of employees (including Higbee), I find Higbee's reduction also involved a violation of Section 8(a)(3) because it was intended to discourage her, and others, from continuing to support the Union; and there is no showing that she would have been selected for reduced hours at the time absent her union involvement. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

2. Proper

Like Higbee, Proper had worked as a LPN at *Grandview* for over 8 years, had actively and openly supported the LPN organizing drive by wearing union buttons at work and hosting union meetings in her home,44 had received work performance ratings of satisfactory or better in all of her yearly evaluations through 1995 and had received no reprimands or other disciplinary actions prior to January 1996.

On January 4, Proper went by the nurses' station where the RN on duty was upset because a resident needed an X-ray and she was having difficulty arranging for an on-site X-ray by a private contractor. Proper offered a suggestion: why not sent the resident to a hospital for the X-ray? The nurse turned and said: "I can't do that because our census is low." Proper inquired: "Since when can we not send a patient into the hospital because our census is low?" No answer was given.

On the following day, DON Huffman called Proper into the office and handed her a completed disciplinary form in which (1) she was cited for telling an associate that "a resident was not sent to the hospital due to low census and that the family was made aware of this," (2) given a 3-day suspension, and (3) warned that "[*a*]*ny* [emphasis Huffman's] violation of policy/procedure governing Beverly Ent. and Grandview Health Care will result in termination immediately."45 Huffman did not testify about the matter so I have no way of knowing the extent of her investigation and whether statement attributed to Proper came from the RN or someone else who may not have been present when the incident took place.46 Also I note that while the form cites a prior disciplinary violation by Proper on May 11, 1995, neither it nor the record herein provides any details.47

Responding to an emergency bell on Sunday, February 25, Proper provided assistance to CNA Ginny Lawrence in moving a resident onto a commode. On leaving the room, Proper met Assistant Facility Administrator Jackie Shaffer who took her to another area and told her to keep an eye on Ginny "because she was out of sorts." On the following day, Huffman called Proper at her home and asked her to "write up" Ginny for yelling at the resident. Proper refused stating that Ginny had not yelled at the resident. At the time, Ginny Lawrence was the union steward for CNAs at the facility.

On March 11, Proper was called to the office of the administrator where DON Huffman, in the presence of ADON Stack, handed her another completed disciplinary form and told her she was terminated. That action had been preapproved by Administrator Montell and, in Leesburg, Virginia, by Personnel Director Chapman. All information on the form had been written by Stack. Huffman disclaims having direct knowledge of any of the incidents described therein.

Six incidents are cited in the form. These are considered seriatim below. According to Proper's credited and undisputed testimony, she was not asked to give her version of the incidents either at the termination interview or at anytime prior thereto. Indeed, except for item 6, she was not contemporaneously told that she had done anything wrong.

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[42] The decision was made after Montell consulted with BE-P's labor relations manager in Leeburg. Significantly, It was not based on opposition to the Board's certification decision. Rather, a subpoenaed document (GC Exh. 120) gives as the reason: "LPNs do not have a union contract at *Grandview* . . . [and] she [Carbaugh] was never appointed as Union Steward." In fact, Carbaugh was the designated steward and in that capacity had attended a third-step grievance meeting on January 4.

[43] Higbee voluntarily resigned effective on March 30. On an exit interview form dated April 4 the following entry appears over Administrator Tamara Montell's signature: "Poor work quality. Do not rehire. Poor NSG skills." Montell unequivocally states the comment was not on the form when she signed it and she claims no knowledge as to who wrote it. On the other hand, ADON Stack admits authorship, claiming to have done so prior to Montell's signing the document. Higbee was never told of the comment. Further, neither Montell nor Stack deny making the January 6 through 11 statements attributed to them by Higbee. Curiously, there is another exit interview form dated April 17 and signed by facility DON Angela Huffman that gives "lack of *shift* seniority" as the only reason for Higbee's having been selected for reduction in working hours.

[44] During the 1994 organizational drive a former administrator of the facility, Sharon Provonovich asked Proper to report the names of informational pickets. Proper declined, telling Provonovich that she was for the Union.

[45] According to credited testimony of Proper, Huffman at the same time orally accused her of having previously made another "false accusation" that there had been undue delay in caring for a resident whose hands were cut by broken glass. No prior mention of that matter had been made, no details were provided and no discipline was imposed.

[46] Respondent moves to strike an assertion in the General Counsel's brief that the suspension "violates the Act," terming it a sub silentio effort to amend the complaint. The motion is denied. Though not alleged (nor found herein) to be a violation, the suspension nevertheless is relevant because it is claimed as a progressive step leading to the ultimate discharge of Proper.

[47] In its brief, Respondents mistakenly attribute to May 11 testimony relating to March 4.

Three of the incidents occurred on March 4. The first involves a doctor's order that a resident's respiration rate be monitored every 2 hours and be given morphine whenever the rate was lower than a certain level. Proper checked every 2 hours and, the rate being consistently below level, she administered morphine every 2 hours each time recording having done so in the "Medex" log. However, due to a heavy workload she was unable to record the resident's respiration rate on a "flow sheet" as instructed by Stack. At the end of her workday, Proper passed on Stack's instruction to a nurse on the next shift but the latter also failed to fill out the flow sheet. There is no indication that anyone was disciplined for that omission.

The second incident involves narcotics counting. When Proper began her shift normal procedure was to perform a joint count of narcotics with the departing responsible LPN. On March 4, however, the LPN had left early having simply signed a blank page in the narcotic's logbook. Proper entered the count by herself and then informed her RN supervisor (Betsy Hydak) that she had done so. When her shift ended, Proper made the count jointly with a relief LPN and discovered a disparity that she promptly reported to Stack. The latter checked the form and found that the disparity resulted from a subtraction error. Proper accepted blame for the error stating that she had made the count without assistance.[48] Stack simply pointed out that she should have made certain of the count before signing, thereby to avoid possible responsibility for any missing narcotics. She gave no indication that disciplinary action would be taken. Stack could not recall whether any discipline was meted out to the LPN who signed the blank page.

The third incident concerns giving morphine to a resident. According to Proper, a doctor had called in on March 4 and told her to administer doses sublingually, she wrote the order down, confirmed it with the doctor, and carried it out. In her testimony and in the disciplinary form given to Sharon on March 11, Stack claims that the doctor called in upset that Proper had written on the order "SL" (sublingual) rather than "SQ" (subcutaneous). As noted above, Stack did not approach Proper about the matter prior to issuance of the discipline form on March 11.

A fourth incident occurred on March 1 when Proper clocked out 20 minutes after her shift had ended, contrary to a policy change announced in February that required prior approval of all overtime. Asked whether at any time prior to issuance of the disciplinary citation on March 11 she gave Proper an opportunity to explain why prior approval was not obtained, Stack replied (Tr. 809): "No, but that doesn't matter. It has to be approved [even] if there was a problem or emergency . . . ." There is no indication that anyone else was ever disciplined for a similar infraction.

Proper is also cited for taking 5 to 10 breaks during her 8-hour shifts. Stack was so informed by a supervisor (RN Karen Baker) and she opted to accept that report. No one (including Baker) had brought the question of excessive breaks to Proper's attention prior to March 11.[49]

The sixth and last incident cited in Proper's termination occurred on March 3. Proper testified that on reporting to work that day she was told by the departing RN shift-supervisor that a resident had tried to climb out the bottom of her bed and that "when they pulled her back, her leg twisted." In making her rounds Proper noted that the resident was very restless. She called supervisor (RN Hydak) who came an examined the resident. Proper convey to Hydak what the departing RN had told her. The resident was sent to a hospital where she was diagnosed as having a dislocated hip.

According to Stack, Hydak told everything to her on the following day. Concerned that no one on the 11–7 shift had reported a situation that might involve misconduct, Stack inquired of the charge nurse on that shift. The latter (who is unidentified and did not testify) assertedly told Stack that neither she nor other staff had any involvement in the resident's injury and that all she told Proper was that the resident had injured herself while attempting to move herself further up in the bed. Accepting that explanation, Stack confronted Proper and accused her of providing false information to Supervisor Hydak. Proper next heard of the matter on March 11 when she was cited for making a "false and inaccurate" report.

Although Stack denies awareness that Proper was a union supporter, her supervisors (Hoffman and Montell), both of whom participated in the discharge decision, did not. I find that all of them were well aware of Proper's membership. She participated actively and openly in the LPN organizational drive at *Grandview*, had expressly told the prior administrator that she supported the Union, wore a union button on the job, and had on February 26, refused Huffman's request to demonstrate allegiance to the Company by exercising a supervisor's function and writing up the CNAs' union steward. Indeed, even apart from those circumstances it would be incredible in light of the smallness of the unit (16 LPNs) and Respondent's long and continuing opposition to recognition, if management *did not know* where she stood.

Having in mind Proper's unblemished record as an LPN at *Grandview*, the pattern of unlawful antiunion conduct occurring at that facility around the time of her alleged derelictions (including LPN Higbee's suspension), I infer that the disciplinary actions were taken at least in part because Proper was a known and active union supporter.

Accordingly, Respondent has the burden of showing that the same actions would have been taken in any event. *Wright Line*, supra. It has failed to do so. None of Respondent witnesses made an attempt to justify or even address the circumstances leading to the initial discipline given Proper on January 4; and with respect to the six incidents for which she was cited and discharged for on March 11, all occurred a week or more before that time and appear to have been "stockpiled" with a view to justifying a discharge decision. Proper was not given any contemporaneous indication that formal discipline was to be taken or given an opportunity to explain. Moreover, Stack's "investigations" appear cursory at best and characterized by instant willingness to accept claims of misconduct against Proper.

I conclude that, as in the case of LPN Higbee, Proper was written-up, suspended and terminated to punish her for continuing to support the Union at a critical time and to deter others from doing so, in violation of Section 8(a)(3).

C. Status/Treatment of LPNs—Haida

LPNs at *Haida* are not represented by a union of their own.

Diane McNulty was employed at *Haida* as an LPN for 9 years, from 1987 until her discharge on March 9, 1996. McNulty worked full time on the daylight shift.

McNulty had been actively involved in efforts to organize the LPNs at *Haida*. She attended a meeting with the union organizer at the local library, signed a union authorization card, participated in a "march on the boss" with a demand for recognition, wore badges and pins with union insignia, and served as a member of the Union's bargaining committee negotiating a contract for the service and maintenance unit.

About March 4, 1996, McNulty made a request for a schedule change so that she could attend contract negotiations. The request was denied solely on the basis that the LPNs were not in the Union.

On March 9, 1996, McNulty was summoned to the office where Administrator Pauline Formeck told her that effective immediately she was prohibited her from discussing the Union at any time and from wearing union insignia. McNulty agreed to remove union insignia, but asserted she would continue to discuss the Union on breaks. As a result, McNulty was immediately suspended and subsequently received a discharge letter, effective March 9.

Shortly thereafter Sara Sharbaugh was called to the office and the same scenario was repeated. Sharbaugh had been employed at *Haida* as an LPN for 13 years. Like McNulty, Sharbaugh had been actively involved in efforts to organize the LPNs at HAIDA. She agreed to remove union insignia and refrain from talking about the Union, but was unwilling to forsake union activities. She, too, was immediately suspended and subsequently received a discharge letter.

During the course of the day all other LPNs (approximately 18) were called to the office individually and given the same restrictions. Each promised to comply.

The interviews were conducted and the discharges were effected by directive of Wayne Chapman.

The parties agree that the legality of Respondent BE-P's denying McNulty a schedule change, interrogating the LPNs, and discharging McNulty and Sharbaugh is dependent on the status of the LPNs at *Haida*. If they are statutory supervisors, the actions are lawful because the LPNs are outside the protective aegis of the Act. If, on the other hand, they are employees the actions violate rights protected under the Act. That question is considered below.

Under Section 2(3) of the Act, "[t]he term 'employee'. . . shall not include . . . any individual employed as a supervisor . . . ." Under Section 2(11), a "supervisor" is defined as:

[48] Stack testified that Proper assured her that she had done the count jointly with the cosignatory LPN. In so doing she apparently did not recall having written in the disciplinary form given to Proper on March 11: "3–3–96 Sharon reported to me that she never counted the narcotics with 11–7 shift [stating] that she [the other signatory LPN] just signed the book [in blank]."

[49] Stack's testimony about this matter was contradictory and highly defensive (Tr. 810–812).

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The *Haida* facility is a one-story building divided into four wings, referred to as A, B, C, and D, radiating off a central area. There are about 102–104 beds divided fairly equally among the four wings.

On the day shift, the following nursing management are present in the facility: the director of nursing (DON), the assistant director of nursing (ADON), the RN charge nurse, and the facility administrator, Formeck. The RN charge nurse is assigned to the nurses' station and does not perform hands-on resident care. Also on the day shift, there are three LPNs, one assigned to A and D wings, one assigned to B wing, and one assigned to C wing. The LPNs rotate through the wings on a periodic basis, either biweekly or monthly. Finally, on the day shift, there are 10 CNAs, assigned 2 per wing and 2 in the shower room.[50] The CNAs bid on their jobs under the contract.

On the second shift, there are the following personnel: the ADON/director of staff development; the RN charge nurse, stationed at the nurses' station; three LPNs assigned to A/D wings, B wing, and C wing; and eight CNAs assigned two per wing.

On the third shift, there are the following personnel: the RN charge nurse stationed on B wing; one LPN assigned to A/D and C wings; and four CNAs assigned in pairs, with one pair on A and B wings and the other pair on C and D wings.

Typically, on the first shift, an LPN would spend her workday as follows:

> 7:00–7:15 a.m.—report
> 7:15–9:30 or 10:30 a.m.—pass medications
> 15 minute break
> paperwork or treatments
> 11:00–11:30 a.m.—lunch
> 11:30 or 12:00–1:00—pass medications
> 1:00–2:30—treatments
> 15 minute break
> 2:45–3:30 charting

Similarly, on the second or third shift, an LPN would spend 5 hours passing medications, 1 hour giving treatments, and 2 hours charting.

The LPNs are paid hourly, punch a timeclock, and are paid overtime.

According to undisputed and credited testimony, including witnesses (LPN Mary Noel and CNA Lolita Roundsley) called by Respondent, LPNs have no involvement in many decisions typically reserved to supervisors. Thus, LPNs do not train the nurses aides to become certified, do not conduct orientation for the new CNAs, and do not pair new CNAs with experienced CNAs as part of the orientation process. (McNulty: 1847; Sharbaugh: 1885; Linda Bernard: 2068; Noel: 2137.) LPNs do not make up the schedule for the CNAs, do not assign CNAs to work on particular wings, are not involved in awarding of CNA jobs as part of their contractual bidding process, and do not tell CNAs which residents they are to care for.[51] (McNulty: 1849; Sharbaugh: 1886–1887; Ada Livingstone: 1958–1959; Darlene Prosser: 1974, 1976: and Roundsley: 2116–2117.) LPNs do not permanently, or temporarily, transfer CNAs to different departments, different days, different shifts, or even different wings. (McNulty: 1848; Sharbaugh: 1886; Noel: 2138) LPNs do promote CNAs or recommend CNAs for promotion. (McNulty: 1848; Sharbaugh: 1885.)

LPNs do not assign the breaks and lunchtimes to the CNAs.[52] They do not assign the CNAs such tasks as filling water pitchers and passing nourishments. (McNulty: 1851; Sharbaugh: 1889–1890; Livingstone: 1959; Prosser: 1976; Roundsley: 2118.)

LPNs do not approve CNA requests for vacation or other time off. They do not decide if CNA absences are excused or not and they do not have access to attendance records for CNAs. If there are calloffs, LPNs do not decide whether to replace the absent CNAs or to work short staffed. LPNs are not involved in obtaining replacement CNAs to cover for calloffs. LPNs do not assign or approve CNA overtime. (McNulty: 1850–1852; Sharbaugh: 1888, 1890; Livingstone: 1958; Prosser: 1975; Roundsley: 2116–2117; and Noel: 2139–2140.) LPNs do not initial the timecards for CNAs if the timeclock malfunctions or if CNAs forget to punch in or out. (McNulty: 1856; Sharbaugh: 1891; Livingstone: 1959; Prosser: 1977; Roundsley: 2118; and Noel: 2142.)

LPNs do not answer grievances filed by CNAs and are not provided a copy of the contract covering the CNAs by management. (McNulty: 1852; Sharbaugh: 1890; and Noel: 2140.) Nor do they lay off CNAs or recommend CNAs for layoff, recall CNAs from layoff or recommend CNAs for recall. They do not grant CNAs raises or other financial rewards or make recommendations for such rewards. (McNulty: 1850; Sharbaugh: 1887; and Noel: 2139.) LPNs do not complete accident or injury reports for the CNAs. (McNulty: 1856; Sharbaugh: 1891.)

LPNs do not substitute for the RN charge nurse, ADON, or DON, if any of these individuals is absent from the facility.[53] (McNulty: 1856; and Sharbaugh: 1891.) LPNs do not attend management meetings at which strategy for the collective-bargaining negotiations was planned. They did not attend management meetings at which strategy for the strike was planned and they were not given a copy of the strike contingency plan. They are not authorized to make purchases on behalf of the facility. (McNulty: 1856; Sharbaugh: 1891–1892; and Noel: 2143.54)

With respect to hiring, the record is clear that the LPNs had no involvement in the hiring of CNAs before the spring of 1996. (McNulty: 1846; Sharbaugh: 1884; Jane White: 1931, and Depto: 2041.) DON Settlemeyer admitted that it was only shortly before the strike that LPNs were first assigned any responsibilities in connection with hiring.[55] (Settlemeyer: 2230.) Even then, as credited testimony set forth below makes clear, the LPNs did not hire CNAs or make effective recommendations as to the hiring of CNAs.

Specifically, McNulty in 9 years of employment with Respondent had no involvement in the interviewing or hiring of CNAs. However, in about early March 1996, McNulty was directed by ADON Nancy Pietak to participate in two interviews.[56] McNulty understood that Pietak had independently interviewed the two applicants, and indeed, the ADON was also present for part of the time when McNulty met with the applicants. McNulty made no written report of the interviews. She was asked by the ADON if she recommended hiring the applicants and McNulty answered yes. McNulty did not know if the applicants were hired, and the record does not reveal whether that was the case.

In addition, LPN Depto in her 6 years of employment at the facility before the spring of 1996, had never interviewed anyone. In March 1996, she was directed to participate in two interviews, one conducted by the Pietak ADON and another conducted by an RN charge nurse. Depto was directed to complete a form giving her recommendation on hiring. In both cases, Depto recommended hiring the applicants. However, Depto was never informed whether the applicants were hired and, subsequently, Depto never saw either applicant working in the facility.

Similarly, LPN Jane White during her 13 years of employment at the facility before the spring of 1996, she did not participate in CNA interviews. However, in the spring of 1996, White was directed to participate in two interviews, and provided with a list of questions for her use during the interviews. White was not asked to make a hiring recommendation. About 2–3 weeks later, she was asked to complete a recommendation form for one of the applicants. By that time, that applicant had already been hired and was working at the facility.

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[50] There is also a restorative aide working on the first shift. The record does not disclose to whom the restorative aide reports.

[51] The CNAs themselves decide among themselves which residents each will care for.

[52] A schedule of CNA break and lunchtimes is posted at the nurses' station.

[53] Although LPN Noel testified that she substituted for the RN charge nurse, on cross-examination, Noel admitted that this "substitution" occurred only when the RN was on lunchbreak and that an RN was always present in the facility.

[54] Noel admitted that the only meetings she attended to prepare for the strike were ones at which staffing was discussed.

[55] She further testified that a much earlier attempt to involve the LPNs in interviewing was abandoned.

[56] The timing of the interviews indicates that Respondent was hiring replacements in anticipation of the strike.

Several CNAs, including one called by Respondent, also testified about their interviews, hiring and orientation. They uniformly testified that no LPN was involved in their interview, or subsequent orientation. (Livingstone: 1956–1957; Prosser: 1973–1974; and Roundsley: 2115)

In view of the above, I find the LPNs had no authority to hire or effectively to recommend hiring CNAs. Certainly in this area the LPNs have not exercised independent judgment as required in Section 2(11). To the contrary, the evidence discloses that the purported participation of the LPNs in the hiring of replacement employees was little more than a sham.

LPNs are assigned to evaluate the CNAs on an annual basis, or upon the completion of a probationary period. The LPN receives an evaluation form with the name of the CNA on it. Since the LPNs are not granted access to the CNA personnel records or attendance records,[57] typically the ADON either completes the sections of the evaluation dealing with attendance issues and prior discipline before giving the form to the LPN, or the ADON attaches a "post-it" note to the evaluation which includes notations on attendance and prior discipline that the LPN is to write on the form. After the LPN completes the form, it is returned to the ADON for her approval. During the ADON's review, the LPN may be directed to make changes.[58] After the ADON approves the evaluation, the LPN presents the evaluation to the CNA. (McNulty: 1852–1856; Christine Parrish: 1941–1942, 1950–1951; Anita Selfridge: 2004–2034; and Linda Bernard: 2061–2063.) In this regard, I note that even the witnesses called on behalf of Respondent, LPN Noel and DON Sedlemyer, did not dispute these procedures. (Noel: 2145–2156; and Sedlemyer: 2209–2212.)

Evaluations completed by the LPNs clearly reveal substantial input from the ADON in the process: each evaluation includes the ADON's[59] written comments, her signature, or both. (GC Exh. 344—Helen Davidson; GC Exh. 345—Karen Stasko; GC Exh. 346—Shirley Magulick; GC Exh. 347—Mary Cence; GC Exh. 348—Helen Thomas; GC Exh. 349—Esther Onderko; GC Exh. 350–Terry Thomas; GC Exh. 351—Karen Panaro; GC Exh. 352—Karen Michaels; GC Exh. 353—Jancie Holland; and GC Exh. 354—Gerald Michaels.) Longstanding Board precedent holds that when, as here, charge nurses perform evaluations that do not, by themselves, affect other employees' job status,[60] the charge nurses are not supervisors. *Ten Broeck Commons,* 320 NLRB 806, 813 (1996); *Manor West, Inc*., 313 NLRB 956, 959 (1994); *Providence* Hospital, 320 NLRB 717, 727–730 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Passavant Health Center*, 284 NLRB 887, 891 (1987); *Eventide South*, 239 NLRB 287, 288 (1987); *McAlester General Hospital*, 233 NLRB 589, 591 (1977). Moreover, the ADON reviews the evaluations completed by the LPNs and changes those items that the ADON believes do not accurately reflect the work of the CNA. *Ten Broeck Commons*, supra at 813.

With respect to discipline, clearly before 1996 LPNs played virtually no role in the discipline of the CNAs. For example, LPN McNulty in her 9 years of employment at *Haida* had never written up anyone and did not know where the discipline forms were kept. Similarly, LPN White in her 13 years was never involved in any discipline of a CNA.

After the strike, however, when an RN charge nurse wrote up two CNAs for their failure to empty the Attends barrel, she directed LPN White, who had not observed the incident, to sign the discipline as a witness. LPN Bernard had the same experience when, again after the strike, ADON Pietak wrote up another two CNAs for failing to pull a privacy curtain. After signing Pietak directed Bernard to sign the writeups as well and to present them to the CNAs.

In her 4 years of employment before the strike, LPN Parrish participated in three writeups, but in each case the decision to issue discipline was made by someone higher in management, such as the RN charge nurse, ADON, or DON.

However, since the strike Parrish has participated in four writeups. One involved a Foley bag left on the floor. Parrish advised the RN charge nurse, who then consulted with the DON Settlemyer. She directed Parrish to write up the CNA at fault, Kathy Barnosky. On another occasion, Parrish discovered that a CNA (Karen Powers) had failed to put a resident in a wheelchair. Parrish first discussed the matter with the RN charge nurse who assisted Parrish in drafting the writeup. Parrish checked the box on the form indicating that this was a written warning, but was directed by the RN charge nurse to reduce the discipline to an oral warning. In the third situation, Parrish was directed to issue this writeup by the RN charge nurse, who told her what to write on the form stating: "I'm really sorry Chris, but Nancy [ADON Pietak] specifically said you had to do this." The fourth situation, involved writeups of two CNAs for soiled linen. Subsequently, the DON Settlemyer conducted her own independent investigation of the incident and determined that there was insufficient evidence to support the imposition of any discipline.

During her 13 years of employment at *Haida*, LPN Selfridge had never written up any CNA. However, since the strike, Selfridge was involved in three writeups. In one, ADON Pietak directed her to sign writeups for two CNAs (Margaret Moore and Donna Ziblinsky) for failing to pull privacy curtains. Selfridge had not observed the incident and Pietak did the writeup but directed Selfridge to sign and present them to the CNAs. On the second occasion, Selfridge could recall only writing up CNA Chloe Ludwig for something and that Pietak also signed. The third occasion involved a resident who fell while in the care of CNA Betty Lechine. Selfridge did so, but what she wrote did not please Pietak. The latter called her to the office and with Settlemyer present ordered her to rewrite and told her what to write. Thereafter, Selfridge was disciplined herself, for her failure to properly issue the discipline to the CNA.

Four other writeups by LPNs were produced by Respondent in response to subpoena. Each on its face shows significant involvement of Pietak and Settlemyer in the writeups. Further, only one was issued before the strike, on March 13, 1996.

As detailed above, the LPNs' role in the disciplinary process prior to the March 9 alleged discriminations against them was insignificant at best; and despite the subsequent efforts to clothe them with responsibility for write-ups, it is abundantly clear that even then LPNs were not permitted effectively to impose discipline or to recommend its imposition.

The Board has consistently held that in order for the charge nurse's discipline to confer supervisory status, the discipline must lead to personnel action, without the independent investigation or review of other management personnel. *Ten Broeck Commons*, supra at 812; *Manor West, Inc.*, supra at 958; *Northcrest Nursing Home*, supra at 492–498, 505–507; *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989); *Passavant Health Center*, supra at 889. As is readily apparent in the instant case, the LPNs do not exercise independent judgment in the imposition of discipline.

With respect to the nature of direction LPNs provide over the work of the CNAs, the evidence leaves no doubt that the LPNs provide only routine direction to the CNAs and do not responsibly direct the work of the CNAs. This conclusion is borne out in the testimony of all of LPNs, including the two (Mary Noel and Faye Lenglet) called by the Respondent, as well as by the testimony of the ADON/director of staff development, Paula Lloyd.

The standing operating procedure is as follows:

Each day, beginning on the first shift, there is a sheet prepared by the RN charge nurse listing each resident, by wing. The particular care requirements for each resident, such as the need to take a temperature, monitor input and output of liquids, monitor stools, take vital signs, remove a splint, or monitor a cough, are noted on the sheet. Information that remains constant is merely xeroxed from the master sheet, while other information is written by the RN charge nurse and some information is written by the LPNs; the CNAs fill in various blanks indicating such things as if the resident moved her bowels. Based on information from report, the LPNs relate the particular resident care requirements to the CNAs who are actually responsible for performing basic tasks. As noted, the LPNs spend the bulk of their workday performing hands-on resident care. While the

[57] It was only shortly before trial that the LPNs were directed to review the CNA personnel files and attendance records themselves.

[58] LPN McNulty was directed by the ADON to change a numerical score and did so; and whenever LPN Anita Selfridge wrote comments on an evaluation, the ADON gave the evaluation back to her and directed her to redo it.

[59] Most of these evaluations include the comments and signature of the current ADON (Pietak), some have the comments and signature of the former ADON, Nadine Kirsch.

[60] Indeed the value and utility of CNA evaluations at *Haida* are severely circumscribed because CNAs are covered by a contract. Thus, evaluations do not form a basis for a wage increase or other financial reward since those items are controlled by the contract. Nor are evaluations the basis for adverse employment actions such as transfers to a different position since the contract contains a procedure for bidding on jobs. Moreover, Administrator Formack admitted that no CNA has ever been terminated based on a poor evaluation; and Respondent offered no evidence of an evaluation being used as a basis for any personnel action.

LPNs are working on the floor, the CNAs report unusual resident conditions to the LPNs who either deal with the situations themselves or if the conditions are more serious, report the matter to the RN charge nurse. (McNulty: 1862–1863, 1873–1876; Sharbaugh: 1892–1896; Parrish: 1946–1948; Selfridge: 2006–2008; Bernard: 2056–2058; Noel: 2132–2134; Lenglet: 2270–2272; and Lloyd: 2280–2283, 2290–2291.)

Typically, LPN McNulty informs the two CNAs on her wing of any particular care requirements when she passes medications in the morning. During the day, she asks CNAs how things are going, and in order for her to complete her paperwork, she also asks them for specific information or reviews paperwork of the CNAs. If CNAs have questions or if she observes them doing something incorrectly, she shows them the correct way to perform the task, such as the proper way to make a bed or the proper way to lift a resident. Sharbaugh conveys resident care information to the CNAs in a manner similar to McNulty. She also explained that CNAs report unusual resident conditions, such as an elevated temperature, a bruise or a bed sore, to her, and that she would pass this information on to the RN charge nurse.

In determining whether the direction of work by charge nurses satisfies the statutory mandate of Section 2(11) of the Act, the Board decides whether such direction requires the use of independent judgment or whether such direction is merely routine. *Ten Broeck Commons*, supra at 807. In that case, the Board summed up evidence relating to duties of CNAs vis a vis LPNs, as follows:

> The essential duty of the CNA is to take care of elderly people who are no longer able to care for themselves. For the most part, such duties require little skill, are repetitive, and at times even unpleasant.
>
> Every day, CNAs must perform the same care, in the same manner, for the same people. To be sure this is done, the Employer requires that each patient's particular needs be kept in the Aidex. It is the responsibility of the CNA to consult and follow the Aidex with respect to each patient and perform all functions indicated for each resident.
>
> One of the LPNs' responsibilities is to be sure that the CNAs are properly performing their jobs. Thus, LPNs make patient rounds and consult the Aidex. If an LPN sees a patient that needs attending to or a job that has not been properly done, the LPN will call it to the attention of the CNA. This type of direction does not require the independent judgment of Section 2(11). [Supra at 811.]

That summary is equally applicable to the situation presented in the instant case, and impels the same conclusion, i.e., that the LPNs' direction of the CNAs herein does not require exercise of independent judgment.

Finally, there is the matter of job description given LPNs. Read in the abstract, the most recent description clearly endows them with independent authority characteristic of statutory supervisors. The reality however, as shown on this record, is that they never have had nor have they ever exercised such authority. This is seen in the matter of evaluations and discipline analyzed above. In reality, the written descriptions merely make it appear that the LPNs are supervisors, when they are not.

Specifically, I note that item 2 of the job description recites that an LPN "receives the preceding shift report, informs and updates staff, and relays report to on-coming shift." In fact it is the RN charge nurse who prepares the sheet and it is the RN charge nurse who gives reports to the next shift. Moreover, in relaying resident care information to the CNAs, the LPNs are merely functioning as a conduit, relating what is set forth on the sheet.

Another example is item 20 which recites that an LPN "has responsibility for direct administrative and technical supervision of nursing unit; is in charge of unit with a registered nurse on call and located within a 30 minute drive of the facility," whereas in practice there is always a registered nurse on duty in the facility who invariably exercises that responsibility. Again, item 24 states that an LPN "is responsible for assisting in the orientation and training of new nursing personnel." As the testimony of every LPN cited above makes clear, the LPNs have no involvement whatsoever in the training or orientation of the new CNAs.

Further, item 26 positions the LPN as the one who "prepares written job performance evaluations that are revised and completed by the supervisor and the DNS [director of nursing services] and are relied upon for transfers, wage increases, assignments, and/or terminations." As detailed above, higher management regularly revised the evaluations performed by LPNs; the significance of evaluations is sharply diminished by provisions in the contract. A review of the other elements of the job description reveals that they fare no better than the items analyzed above.

It is well established that proper determination of the status of charge nurses is contingent on whether they actually perform supervisory functions, and that a grant of authority on paper, which is in practice illusory because it is never exercised, is not sufficient to make a charge nurse a supervisor. *Eventide South*, supra at fn. 3; *Pine Manor Nursing Home*, 238 NLRB 1654, 1655 (1978); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

Considering the above and the record as a whole, clearly the LPNs at the *Haida* facility are not shown to be supervisors within the meaning of the Act.[61] I find them entitled to all the protections accorded employees under the Act. Accordingly, Respondent BE-P violated Section 8(a)(1) by prohibiting them from talking about the Union, by prohibiting them from wearing union buttons and insignia anywhere in the facility, and by interrogating them about their union sympathies. Further, Respondent violated Section 8(a)(3) by refusing to allow LPN Diane McNulty to change her schedule to attend contract negotiations, and by discharging her and Sara Sharbaugh because they would not renounce their support for the Union.

D. Alleged Unlawful Insignia Prohibition—York

There remains one other allegation of unlawful action with respect to LPNs. In July 1995, LPNs Christin Krusnosky and Catherine Verdier voted for representation of LPNs at *York* by Local 1199P and both had made known their stance by wearing prounion stickers while on duty at the facility.

On February 14, they were called into the office where DON Caroline Nelson, after telling them that as LPNs they were not eligible for union membership, ordered them immediately to remove union stickers from their uniforms. Although they promptly complied, Verdier commented that when recognition came "we're going to wear them [again]." Nelson replied, "Well maybe, [adding, *sotto voce,* as there turned to leave] if you're still here." Respondent BE-P chose not to call Nelson as a witness.

As in the case of LPNs at *Haida*, if the LPNs at *York* were not supervisors they had a right to wear union insignia and Respondent's action in ordering them not to do so violated that right.. Since their unit was certified on August 27, and the Board upheld the certification on September 23, 1996,[62] I find a violation of Section 8(a)(1).

VII. SUFFICIENCY OF STRIKE NOTICES UNDER SECTION 8(G)

Section 8(g) was added to the Act in 1974 as part of the Nonprofit Hospital Amendments that extended coverage to include health care institutions. It provides, inter alia, that a union must give 10 days written notice of a strike against such institutions. The 10-day notice, according to Congressional Committees sponsoring the legislation,[63] was intended to give them sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care.

In this case, the Unions on March 14 and 15 sent to administrators of 15 of the involved nursing homes[64] and the Federal Mediation and Conciliation Service notices advising that a strike would occur at those facilities on March 29. It is conceded that those notices fully comply with Section 8(g).

On March 27, however, other letters were sent to the same addressees advising that the Unions had extended the strike deadline by 71 hours, from 7 a.m. March 29 to 6 a.m. Monday, April 1. Respondents contend that the extension of the strike notices does not comply with "clear and unambiguous language" in the concluding sentence of Section 8(g), to wit: "The notice, once given,

[61] It is well established that the burden of proving supervisory status is on the party asserting it. *Chevron, U.S.A.*, 309 NLRB 59, 62 (1992), enfd. mem. 28 F.3d 107 (9th Cir. 1994); *George C. Foss Co. v. NLRB,* 752 F.2d 1407, 1410 (9th Cir. 1985); and *Tucson Gas & Electric Co*., 241 NLRB 181 (1979).

[62] A complaint issued on January 31, 1997, as amended April 15, 1997, in Case 4–CA–25579 alleging a refusal to bargain with the new LPN unit in violation of Sec. 8(a)(5) of the Act.

[63] S. Rept 93-766, 93d Cong., 2d Sess. at 4; H. Rept. 93-1051, 93d Cong., 2d Sess. at 5.

[64] *Monroeville, Clarion, Fayette, Franklin, Haida, Meadville, Meyersdale, Mt. Lebanon, Murray, Richland, William Penn, Reading, Lancaster, Caledonia***,** and *Carpenter.*

may be extended by the written agreement of both parties." Since, admittedly, the Unions' action in extending the deadline was taken unilaterally, Respondent's argue that the subsequent 3-day strike commencing on April 1 was unlawful and, consequently, that they were under no constraint to take back the approximate 450 employees who participated—even assuming the strike was in protest against unfair labor practices.

That precise issue was presented and resolved in the "*Bio-Medical"* case, *Greater New Orleans Artificial Kidney Center*. 240 NLRB 432 (1979). There the Board, after citing the following language in the Congressional Committee Reports:65

> It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee's intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advance notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action.

went on to adopt the 72-hour window and 12-hour advance notice rule as a parameter for allowing extensions of strike times previously announced in notices issued under Section 8(g). In this regard, it held that the rule established a reasonable "substantial compliance" standard needed to avoid an application of Section 8(g) that would produce "an unwarrantedly harsh result [i.e., depriving strikers of protected status] not intended by the Congress."

The *Bio-Medical* precedent has been uniformly followed by the Board since 1979. *Hospital & Health Care Employees District 1199-E (Federal Hill Nursing Center),* 243 NLRB 23 (1979); *Bricklayers & Allied Craftsmen Local 40 (Lake Shore Hospital)*, 252 NLRB 252 (1980); *Nurses Ana (City of Hope),* 315 NLRB 468 (1994).

In light of the clear and consistent precedent set by *Bio-Medical* and its progeny, any change of interpretation in this area is matter for Board determination; and Respondents' recourse is at that level. *Iowa Beef Packers,* supra. Applying existing policy, I find that the extensions of the strike notices satisfied the requirements of Section 8(g).

VIII. NATURE OF THE STRIKE

At each of the 15 homes that experienced a strike, issuance of the strike notice and the decision to strike were put to separate votes at meetings conducted by the union representatives. At these meetings, the union representatives enumerated the various perceived unfair labor practices at the facility, and in many cases, apprised the members of similar unfair labor practices occurring at other facilities as well. The union representatives clearly informed the bargaining unit members that the vote was being undertaken to protest Respondents' unfair labor practices. It was made clear to members that the strike was not in furtherance of the Unions' demands in contract negotiations. The testimony of the union representatives conducting the meetings at each facility as well as the testimony of corroborating employee witnesses attending meetings at each facility is consistent and credible. It clearly establishes that the employees voted to strike in protest against persistent and numerous unfair labor practices which, on this record are shown to have occurred at each of the 15 facilities.

Further, in addition to striking over Respondent's unfair labor practices in their own facilities, the employees struck in sympathy over unfair labor practices at the five other facilities operated by Respondents. That aspect of the strike is also protected under the Act. *C. K. Smith & Co.,* 227 NLRB 1061, 1072 (1977), enfd. 569 F.2d 162, 165–166 (1st Cir. 1977).

Respondents were well aware the strikers were protesting unfair labor practices. In their notices, the Unions characterized the strike as an unfair labor practice strike; and through picket signs and public statements, the Unions and striking employees amply conveyed that they were engaged in an unfair labor practice strike.[66]

It is well settled that a strike is considered to be an unfair labor practice strike as long as one of its objectives is to protest unfair labor practices. *Kosher Plaza Supermarket*, 313 NLRB 74, 88 (1993); *R & H Coal Co.*, 309 NLRB 28 (1992); *Northern Wire Corp*., 291 NLRB 727 fn. 4 (1988), enfd. 887 F.2d 1313 (7th Cir. 1989). This being the case, the fact that frustration over the slow progress of contract negotiations may have played a part in the strike vote lacks significance.

Having established that that Respondent committed the numerous and diverse unfair labor practices before the strike and, further, that the strike was to protest those unfair labor practices, it follows that Respondents had an obligation under the Act immediately to reinstate the strikers to their former positions upon their unconditional offer to return to work67 and that their failure so to do constitutes an additional unfair labor practice.68*Teledyne Still-Man*, 298 NLRB 982, 985 (1990); *American Gypsum Co*., 285 NLRB 100 (1987). It is a violation of Section 8(a) (3) of the Act to fail to reinstate such strikers. *Radio Electric Service Co*., 278 NLRB 531, 535 (1986). See also *NLRB v. Cast Optics Corp*., 458 F.2d 398, 407–408 (3d Cir.), cert. denied 409 U.S. 850 (1972); *Grondorf, Field, Black & Co*., 318 NLRB 996 (1995); *Orit Corp*., 294 NLRB 695, 699 (1989); *Accurate Die Casting Co*., 292 NLRB 284 (1989).

IX. AFFIRMATIVE DEFENSES

Earlier in this decision I considered and ruled on an affirmative defense asserted by Respondents (JD slip op. at 19). Others are addressed here.

Respondents claim allegations of the amended complaint are subject to deferral under *Collyer Insulated Wire,* 192 NLRB 837 (1971); and *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). Since all of the collective-bargaining agreements expired before the actions giving rise to the complaint, under applicable Board law, those actions presumptively are not arbitrable under the rationale of *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987).

Moreover, Board policy is to honor timely requests for deferral under *Collyer* when doing so would resolve all issues in a case. Here, there are numerous allegations relating to Respondents' failure to comply with its statutory obligation to provide necessary and relevant information request by the Unions, and those allegations are not deferrable under the *Collyer* policy. Thus, piecemeal deferral as suggested by Respondents would run up against Board policy to resolve an entire dispute in a single proceeding. *15th Avenue Iron Works,* 301 NLRB 878, 879 (1991), enfd. 964 F.2d 1336 (2d Cir. 1992).

Indeed, Respondents' assertion that deferral is ingenuous because they are shown to have unequivocally refused to process outstanding grievances to arbitration since the expiration of the contracts. Thus, by memorandum dated December 7, 1995, Wayne Chapman (there denominated BHRI's "Senior Regional Director of Associate Relations" notified administrators of the facilities

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[65] Id. fn. 63.

[66] The local Unions had supported a "Dignity" campaign that made general contract demands for all nursing home workers in Pennsylvania, including those employed at Respondent facilities as well as other facilities owned by entities unrelated to Respondent. Literature and T-shirts supporting the Dignity campaign had the logo "one contract, one fight." The fact that some union members wore such T-shirts to union meetings or even on the picket line, albeit under coats, jackets and rain gear, does not transform what was clearly an unfair labor practice strike into an economic strike.

[67] Respondents stipulated there was an unconditional offer to return to work on behalf of every striker. (Tr. 221.)

[68] At the conclusion of the strike, about 350 former strikers were completely denied reinstatement and an additional 100 were not reinstated to their former positions at 15 facilities based on Respondents' claim that it had a right to and did permanently replace the strikers. After the strike, Respondent continued to reinstate former strikers only as positions became available, without regard to placing them in their former classification, department, number of hours or shift. Typically, a former striker was first offered reinstatement as a casual (on call) or part-time employee and only later, if at all, offered a full-time position. As casual or part-time employees, many former strikers lost their health insurance and other contractual benefits. In January 1997, 11 months after the 3-day strike, 66 former strikers still had not been offered reinstatement in any capacity and 237 former strikers who were not reinstated to the positions they held before the strike. In addition, other former strikers were offered reinstatement to positions that were not their former positions and which were, for various reasons, unacceptable.

involved that the contracts having expired they were, among other things, immediately to effect "elimination of the arbitration provision of the grievance procedure."

Accordingly, I find without merit Respondents' *Collyer* and *Dubo* defense.

Other affirmative defenses are likewise without merit. Thus, the record clearly establishes that Respondents engaged in conduct violative of the Act (Affirmative defense 1); a comparison of the charges and the amended complaint shows that all allegations in the complaint were the subject of charges (Affirmative defense 2); the formal procedural documents received into the record establish that all charges were properly filed and served (Affirmative defense 3); and those documents also prove that the complaint was properly served (Affirmative defense 4 in part) and that all allegations are timely under Section 10(b) of the Act (Affirmative defense 5).

X. OVERVIEW

Considering the record as a whole I perceive a single-unifying theme underlying the numerous and varied violations found: Respondents' abiding determination to demonstrate to employees, both members of the Local Unions and prospective members, the futility of recourse to unionization and its concomitant need to bargain collectively; and in pursuing that objective they were more than willing to and frequently did resort to unlawful means.

Among other things, those means include severing important communications links by revoking union access to facilities and bulletin boards, and discrediting unions' effectiveness by making unilateral changes in terms and conditions of employment and dealing directly with represented employees. Also utilized were an array of coercive tactics such as blatant surveillance of union activities, threats of retaliation, suspension and discharge of union supporters, permanent replacement of unfair labor practice strikers, and humiliation of those who eventually were recalled by assigning them to different shifts, with curtailed working hours and loss of benefits.

CONCLUSION OF LAW

Respondents BHRI and BE-P are shown to have violated Section 8(a)(1), (3), and (5) of the Act in the particulars and for the reasons stated above, and those violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the named Respondents have engaged in unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In light of my "bifurcating" order at 650, the question of whether a single remedial order can and should embrace interrelated "Beverly" Companies has been deferred for resolution by me in a separate proceeding which will be set for expeditious processing following an all-party conference call to be held within 10 days of service of this decision. The issues presented in that proceeding, however, concern only whether remedies should extend to any or all of the interrelated Beverly Companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices.

As to those two Respondents, cease-and-desist orders will be directed against each in regard to unfair labor practices shown to have occurred at facilities admittedly under their direct control and supervision. The validity of those orders does not depend on the result of the "extra remedy" sought in the bifurcated proceeding; and they are subject to normal appeal procedures commencing on service of this decision because, as to those Respondents, this is a final decision within the meaning of the Board's Rules and Regulation 102.45.

Among other things, BHRI and BE-P will be ordered to offer immediate reinstatement to their former jobs all employees who went on strike on April 1 as well as employees (Sharon Proper, Diane McNulty, and Sara Sharbaugh) found to have been discriminatorily discharged, and to make them and other employees found to have been wrongfully suspended (Connie Kollar) or otherwise deprived of income, whole for any loss of wages and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondents' wide-ranging and persistent misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring them to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following two recommended Orders[69]

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

On November 26, 1997, I issued an initial decision in this (Beverly IV) case concerning alleged unfair labor practices and reserved for determination in a "bifurcated" proceeding the question of whether the above-named Respondents were a single employer and whether extraordinary remedies, including a nationwide cease-and-desist order, are warranted.

Those issues were tried in Pittsburgh, Pennsylvania, on May 3–7 and 18–19, 1999.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed on July 1 by the General Counsel and Respondent's reply filed on August 2, I make the following

FINDINGS OF FACT

I. INTERRELATION OF OPERATIONS

A. Corporate Organization

ROVERT T. WALLACE, Administrative Law Judge. During the period in which the found unfair labor practices occurred (late 1995 through mid-1996), the pertinent corporate structure is shown to be headed by Beverly Enterprises, Inc. (BEI), a holding company with David Banks as chief executive officer. Reporting directly to him are Boyd Hendrickson, chief operating officer and the vice presidents in charge of the following departments: legal, business planning and development, finance, communication, and asset management. Other department heads reporting directly to Hendrickson are vice presidents in charge of information services, labor and employment, quality management, marketing and sales, and operational finance.

Also reporting directly to Hendrickson are the heads of four wholly owned operating entities: Respondent Beverly Health and Rehabilitation Services, Inc. (Beverly),[2] Pharmacy Corporation of America, American Transitional Hospitals, and Spectra Rehab Alliance. During the relevant time period, all BEI corporate departments and operating entities were headquartered in Fort Smith, Arkansas.[3] Each business unit within this corporate system is operated so as "to complement our core skilled nursing facility business."

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[69] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[1] The trial initially opened in Pittsburgh on January 27, 1998, but had to be adjourned when counsel for Respondents declined to call any of the subpoenaed witnesses. The General Counsel sought enforcement in the United States District Court for the Western District of Pennsylvania on February 4, 1998. The subpoenas were enforced in full by that court dated January 13, 1999. On February 24, Respondent's motion for stay pending appeal was denied and thereafter Respondents withdrew the appeal.

[2] Beverly is currently doing business as Beverly Healthcare, a marketing name adopted subsequent to the commencement of the instant litigation.

[3] All references to "corporate" are to BEI and/or Beverly, unless specifically noted otherwise.

Beverly, a successor to Beverly California Corporation, is responsible for all corporate nursing homes, approximately 703 in number,4 located in 33 States and the District of Columbia.5 Headed by President Bill Mathies,6 it employs about 80,000 associates (including 27,500 certified nursing assistants) all of whom are engaged in providing health care services. Some of the nursing homes are licensed directly to Beverly and others are licensed to wholly owned subsidiaries which in most instances are denominated as "Beverly Enterprises—(name of State), Inc."7

In addition to the nursing homes, Beverly also operates (under the name of "Beverly Assisted Living") a number of retirement communities in 12 States, and (through "Hospice Preferred Choice") free standing hospice home care programs located in 5 cities.

A sister corporation of Beverly (Pharmacy Corporation of America) provides institutional pharmacy services to the nursing homes as well as to the other health care entities. Another sister corporation (American Transitional Hospitals) operates acute care facilities, including the full management of subacute care units in certain of Beverly's nursing homes. A third sister corporation (Spectra Rehab Alliance) provides rehabilitation management services to the nursing homes.8

At all pertinent times, Beverly's nursing homes throughout the country were grouped into seven geographic regions, as follows: Northeast (or Region 1); Southeast (Region 2); Florida (Region 3);9 Missouri Valley (Region 5); North Central (Region 6); Texas (Region 7); and West Coast (Region 10). Each regional office was under the direction of a regional vice president of operations (VPO) located at corporate headquarters who reported directly to President Mathies. Directors of various departments in each regional office (operations, associate relations, finance, resident care, rehabilitation, and sales.)10 reported to their respective regional VPOs.

Directors, in turn, had subordinates reporting to them. Thus, administrators of nursing homes within a region reported directly to their respective director of operations and other directors supervised specialists (e.g., associate relations representatives, financial consultants, nurse consultants, rehab consultants, and account executives) who provided services for nursing homes within the respective regions. None of these personnel were employed by or reported to administrators of nursing homes; rather, they reported through their respective director, to the VPO, who, in turn, reported to Beverly president, Mathies. Also providing services to the regions were designated Medicare specialists, as well as other designated personnel from the corporate departments of BEI such as safety and loss control managers and construction project managers.

As particularly pertinent, nursing homes in Pennsylvania were included among 108 nursing homes in region 1.11 VPO for that region was Claude Lee. Reporting to him were 10 directors of operations, each responsible for about 9 to 14 nursing homes as well as regional directors for associate relations (Wayne Chapman), finance (Gail Holland), resident care (Judith Buchanan), rehab (Diane Griffen), and sales (Stephen Benjamin).12

B. Management Mobility/Interrelationships

Beverly hired Claude Lee in 1983 as director of reimbursement for what was then called the southern division. He became comptroller and then senior comptroller. When the division was dissolved, Lee became director of finance for the southeast region (Region 2) and from about November 1991 until about November 1993, he served as VPO for the then existing South Texas Region (Region 8). In November 1993, Lee was transferred to Region 1 where he again served as VPO. In October 1996, when the regional structure was replaced by grouping of facilities, Lee became a group vice president in charge of 21 facilities in Alabama.

Wayne Chapman is a another long-term employee, having commenced his employment in May 1982 as vice president of administration within the then existing Heritage division, a grouping of premium quality nursing homes not limited to a specific geographic area. In 1984, he became vice president of human resources for Beverly's eastern division. Following creation of the regional structure in early 1989, he became regional director of human resources for Region 1. In 1991, Chapman was transferred to corporate headquarters in Fort Smith and assumed the position of director of labor/employee relations. In September 1992, he was reassigned to Region 1 and became senior regional director of associate relations. While there, his title was changed to regional director of associate relations. In October 1996, he became a group vice president responsible for facilities located in central and eastern Pennsylvania and New Jersey.

These cases were typical. Interchange of management personnel is shown to have been a common occurrence. Over the years, numerous announcements of management-level job vacancies were posted at individual facilities, at the regional level and in the corporate headquarters. Postings were often headed as follows: "In keeping with company [corporate] policy to transfer and promote from within whenever practical, the attached positions are available."

Notwithstanding the size and complexity of Beverly's operations, the management team, including those at the very top of the corporate hierarchy, have maintained close personal contact with other members as well as with facility level associates. For example, following the strike at issue in these proceedings BEI's CEO (Banks) attended meeting (described as a poststrike "debriefing") at State College, Pennsylvania, for administrators of the struck facilities. Also attending were Beverly President Mathies, as well as Lee and Chapman.

Banks also communicated directly with associates and lesser level submanagement personnel. For example, on October 2, 1995, he issued a memorandum to all associates advising them of the corporate reorganization. Again on April 12, 1995, and in connection with a then proposed spinoff to Beverly stockholders of stock in Pharmacy Corporation of America, he issued a written general advisory concerning a "no trading" period. And on October 19, 1994, Banks sent a memo directing VPOs to distribute a corporate policy on prejudice and discrimination. In the letter he states, "I am particularly concerned by the recent involvement of managers and supervisors in inappropriate and intolerable behavior;" and on April 8, 1994, he urged administrators to support a new corporatewide marketing program called "Share the Spirit." Another example: on March 8, 1994, Banks wrote to

[4] The number of facilities operated by Beverly has varied over time. Some of the homes are owned by it or a wholly owned subsidiary such as Beverly Enterprises—Pennsylvania, Inc. Others are leased by Beverly; and still others are managed by it for other owners. For all practical purposes, however, Beverly exercises full operational authority over leased or managed facilities and does not treat them any differently than ones it owns.

[5] In addition to operations in the United States, Beverly, through a subsidiary (Beverly Japan Corporation), was engaged in a joint venture with several Japanese companies to build long-term care facilities in Japan.

[6] Mathies succeeded Hendrickson who had previously served as president of Beverly California Corporation, and later, Beverly Health and Rehabilitation Services, Inc. Prior to being promoted to president, Mathies served as vice president (operations) of its West Coast Region. Mathies started with Beverly as an administrator-in-training, was promoted to administrator, and subsequently promoted to regional manager, before becoming vice president.

[7] In light of the then-pendency of this phase of the case, in my initial decision herein I treated the record owner and licensee of a number of the involved nursing homes (Beverly Enterprises Pennsylvania, Inc.), as responsible for unfair labor practices commited at those homes. That entity, however, is indisputably shown to be simply a shell through which reports are filed with Pennsylvania governmental authorities. It has no operational functions, is not a statutory employer and is not an entity capable of remedying the violations previously found.

[8] In addition to the Beverly Companies, the BEI corporate structure includes a number of special purpose entities such as Beverly Funding, Beverly Indemnity, and Advinet.

[9] On February 1, 1996, Region 3 was merged with Region 2.

[10] In October 1996, Beverly eliminated regional designations. Facilities were divided into groups designated as either "urban" or "rural." Each group was put under direction of a group vice president who reports to one of two executive vice presidents. They, in turn, report directly to Mathies.

[11] Other nursing homes within region 1 are in Connecticut, District of Columbia, Delaware, Maryland, Massachusetts, North Carolina, New Jersey, Virginia, and West Virginia.

[12] As part of the reorganization described in fn. 10, a former director of operations (William Meenan) became group vice president for nursing homes located in western Pennsylvania and former Regional Director of Associate Relations Wayne Chapman became group vice president for nursing homes located in central and eastern Pennsylvania and New Jersey.

senior and regional management expressing concern about abuses in reimbursement of relocation expenses.

Similarly, Beverly COO Hendrickson maintained close personal contact with facility level management. Example: As part of the grand prize in a corporatewide census contest held in late 1995, two top rated administrators were selected to attend a Super Bowl party at his home.

Beverly President Mathies also communicated directly with facility management. Examples:

- In October 1996, he wrote to administrators announcing the restructuring which eliminated the Regions.
- On May 23, 1996 he again wrote to administrators asking them to complete a survey of clinical services available at their facilities.
- On February 16, 1996, he advised administrators of a nationwide implementation of a retrofit program designed to upgrade lighting systems within the facilities.
- In early June 1996, he wrote a letter to all Beverly Managers (with copies to all VPOs, Regional Directors, Regional Consultants, Directors of Operations and Administrators throughout the country) in which he gave an update on the strike involved in this case.13 Therein, he discussed a number of developments and specifically addressed the strike as follows:

> While the unions find it in their own interest to attempt to paint us in as negative a light as possible, the vast majority of our associates recognize that we are trying to do the right thing for everyone: residents, associates, and families. Recently in Pennsylvania, the union was able to mount only a 3-day strike, and even then, so many of our associates disagreed with the strike that the union members at 5 out of 20 facilities in Pennsylvania refused to do anything more than mount informational pickets. Several hundred members crossed picket lines during the strike, a clear repudiation of the union.
>
> The administrators in these states were well prepared and made the effort to conduct a pro-active communications campaign that ensured the company's messages on labor issues were clear and consistent. It's this kind of "going the extra mile" for our residents and associates that makes me proud of all of you. I'm proud to be in a company where so many people pull together and continue to work to care for our residents during trying ordeals.

C. Purchase and Sale of Facilities

Decisions as to whether to purchase or sell facilities were made by Beverly and/or BEI. Thus, in October 1995, Beverly President Mathies formulated a draft of the business plan for BEI entitled "Strategic Vision 2000." Among the corporate actions recommended in this plan and subsequently undertaken was the divestiture of unprofitable operations in Connecticut, Texas, and Indiana.

Participation of administrators in the divestiture process was limited to listing services being provided at affected facilities. They had no say with regard to any ultimate decision on divestiture. Once decisions were made, all purchase and sale transactions were handled at the corporate level.

D. Licensing

Another operational function handled above the facility level was the licensing of the individual nursing homes. When an administrator received a license renewal application form from State authorities, he forwarded it to the regional level where it was completed and sent directly to the appropriate State.

E. Capital Expenditures

Within the corporate offices of BEI is a department of asset management the head of which reports directly to CEO Banks. That department has a division (Corporate Construction) responsible for coordinating renovation of existing nursing homes. For that purpose, it has a number of project managers each responsible for designated nursing homes and, collectively, their activities encompass Beverly facilities throughout the country.

As part of its responsibilities, this division accomplished a nationwide lighting retrofit project using designated third-party contractors. It also coordinated a country wide roofing maintenance program.

Although administrators of nursing homes could ask higher management for capital appropriations, their requests had to be approved by a corporate task force comprised of selected Beverly VPOs and directors of operations, as well as officers of BEI.

Under capital appropriations request procedure, administrators are permitted to approve capital expenditures up to $5000. Other officials have approval authority as follows: between $5000 and $25,000—directors of operations; $25,000 and $100,000—VPOs; $100,000 and $250,000—Beverly President Mathies; and over $250,000—two BEI vice presidents. The procedure also permits individual regions to impose more restrictive approval levels. Indeed, the West Coast region did so by taking away administrators' authority to approve any capital expenditures.

F. Budget

Strict corporate oversight of financial matters applies in other areas as well. Creation of budgets involves a multistep process that begins with initial drafts prepared at the corporate level based on past experience and updated with assumptions about rates of reimbursement, room rates, wages, utilities, and other costs.

For 1996 budgets, the process began August 1, 1995, with personnel from BEI financial departments sending reporting requirements to the regional directors of finance. Thereafter, information was exchanged among corporate financial personnel. On October 13, 1995, budgets were mailed from corporate headquarters to individual facilities. At that point, administrators made modifications and submitted the revised budgets to their respective director of operations for review. The latter reviewed the budgets, usually made changes, and then forwarded a consolidated budget for all facilities in their respective regions to appropriate VPOs who, after reviewing them and making changes consistent with corporate goals, generated consolidated budgets for areas within their responsibilities.

Consolidated budgets were returned to corporate headquarters on or about November 22, 1995. Reviews were conducted in Dallas by the VPOs, regional directors of finance, and Beverly President Mathies. The final step was approval by BEI's board of directors.

Once facility budgets were approved, administrators were closely monitored by their respective directors of operations to assure observance. Examples:

- A Director in charge of facilities in Kansas, by memo dated March 9, 1995, told administrators that "no one can use Other Earnings without approval from me. We must get this under control. If you feel you must use Other Earnings, give me a call for approval first."
- A Director in charge of facilities in Washington, by memo dated April 18, 1995, informed an administrator that "since your facility continues to run over budget on hours of labor, it is required that, effective today, you fax to my office your key factors on a daily basis."
- A Director in charge of facilities in Texas, by memo dated November 16, 1995, to administrators in her Region, addressed labor costs. She reminded them that despite her earlier directives the problem of low census and high labor costs persisted. She went on to add: "No more excuses . . . Implement measures today and be prepared to discuss them with me in tomorrow's meeting."
- A Director, by memo dated April 22, 1996, informed administrators in her Region that unnecessary overtime was being paid, particularly at 5 named nursing homes. She directed each administrator to submit a corrective plan of action by May 1.

Under Beverly's incentive plan, administrators could receive a bonus based for below budget operations. Conversely, failure to operate within budgets has serious consequences. For example, on January 19, 1996, VPO Lee wrote that a director's decision to terminate an administrator was

[13] On April 3, 1996, while the strike was in progress, Mathies gave VPOs an overview of what was happening and commended management for "success."

justified because it "was based on a lack of progress in developing business to offset the significant financial losses."

G. Goods and Services

Also lodged in the corporate offices of BEI is a department of purchasing the head of which reports to a counterpart in Beverly's asset management department. The latter, in turn, reports directly to CEO Banks. The purchasing department negotiates contracts with major vendors and provides nursing homes with lists of products available through them. Administrators purchase products from the vendors using a computerized order entry system. Items so ordered are shipped directly to individual facilities. Vendor invoices, however, are sent to corporate headquarters.

Virtually every item needed to operate a nursing home is available through the approved list of national vendors: nursing and medical supplies, linens and housekeeping supplies, staple foodstuffs, business office supplies and promotional items; and, as noted above, pharmaceutical supplies are available to the facilities through Beverly's sister corporation, Pharmacy Corporation of America. For inexpensive items not available through this "normal purchasing channel" administrators were urged to pay with a "Beverly Visa Card" instead of using petty cash.

Dietary purchases represent the single biggest purchase item for individual nursing homes, after wages and benefits. Because of that circumstance, a dietary purchasing procedures task force was created under the direction of the executive vice president of development. Among other things, the task force recommended creation of corporate menu committees corresponding to the regions, which would be responsible for menu planning and cost control, and creation of a corporate dietary committee responsible for oversight of the dietary program. Further, it was recommended that order guides synchronized to the menus be produced and that the corporate purchasing department keep track of purchases by the individual facilities which deviated from the guides and/or from the approved vendor list. After the recommendations were forwarded both up and down the corporate hierarchy—up to CEO Banks and the BEI executive officers and down to the VPOs, directors of operations, and administrators—they were implemented in substantial part.

One nationwide program of special significance in this litigation was the Attends incontinence program. The Attends program was first introduced as a pilot program in facilities in California in 1994. This was followed by a second pilot program in Pennsylvania, which was later expanded. Thereafter, the program was made effective nationwide. This was accomplished in a phased manner with specialized training provided throughout the implementation. One of the training manuals included a welcoming letter from Beverly's then President Hendrickson. About 75 percent of the facilities participated in the program; the remaining facilities, with the approval of the VPO, opted out.

Another function closely related to purchasing was inventory. On an annual basis, there was a physical inventory conducted at 100 randomly selected facilities which was used as a sample to calculate the value of the inventory supply items for "the entire company." The inventory was coordinated by corporate personnel and involved direct participation of an observer from Fort Smith at each facility selected. Corporate directives to VPOs indicate that overtime would be required at selected facilities; and to offset this unanticipated labor cost, the facilities received an "incentive" credit.

In addition to standardized purchasing, BEI created standardized contracts, which are used in obtaining services for the nursing homes. These cover services such as cosmetology, podiatry, and dental services, and in fact, cover "almost every service necessary for operation of [the] facility." These contracts had to be approved by either the director of operations or the VPO, depending on the nature of the service.

The range and intensity of corporate oversight of facilities is illustrated by a letter sent to administrators in region 1 by VPO Lee on August 1, 1994, wherein he gave detailed instructions on how to complete the BEI contract forms, even to the extent of advising administrators of the correct legal names of their respective facilities.

Even officials at the highest level are shown as being directly involved in monitoring expenses of individual nursing homes. For example, on November 18, 1994, CEO Banks after reviewing costs attendant upon use of Federal Express at Fort Smith, directed headquarters personnel to reduce or eliminate use of that carrier. At the same time, he told VPOs to do likewise at homes within the regions, adding that compliance would be monitored monthly. Similarly, on January 24, 1994, the executive vice president of development (Bobby Stephens) announced that AT&T was selected to be the Company's primary long distance carrier. Thereafter, on three occasions between March 1994 and February 1995, he wrote to VPO Lee reminding him that certain facilities in region 1 had not changed to AT&T.

Stephens also closely monitored purchases of supplies outside the Beverly purchasing system. Thus, on February 21, 1995, he wrote informing Lee that a random audit of 19 facilities in Region 1 revealed substantial purchases outside "our system." Therein, Stephens directed Lee to

> [P]lease let me hear from you in writing that these facilities will be in compliance within ten working days, as we will be contacting each of these vendors *to inform them* that we will not pay for any future invoices from their company unless we have a written contract or purchase order from this office. Claude, in the future, on all purchases over a certain dollar amount we will require competitive bids and documentation in this office [emphasis his].

A copy of the letter was sent to Banks.

In a widely circulated internal document dated April 5, 1995, Stephens reported a nationwide (1) 35-percent noncompliance in medical supplies/equipment purchasing, (2) that goods valued in excess of $1,000,000 monthly were being purchased from unapproved vendors, and (3) that purchases of unapproved products from approved vendors continue to occur. This led to recommendations of a task force that the corporate purchasing department generate monthly reports detailing purchases made outside the system, that the directors of operations be trained regarding the purchasing system and that they, in turn, train facility personnel, and that controls be established with approved vendors to avoid purchases of nonapproved products. The recommendation was promptly implemented in substantial part.

H. Travel

Travel is another area involving centralized direction by a corporate department (transportation and travel) headed by a vice president (Charles Bell) who reports to CEO Banks through Stephens. All arrangements for business travel within the Beverly complex are made at corporate level through the "Beverly Travel Center" utilizing corporate contracts with designated airlines, hotels and car rental agencies.

In this area also administrators had no discretion to depart from corporate policy.

I. Communications

To enhance intracorporate communication, BEI created a corporate department (information technology) under the direction of a vice president (Barry Ganley) who reports to COO Hendrickson.

As part of the effort to maintain regular contact between the various levels and entities, there are at least four types of computer programs in place at individual nursing homes nationwide. These programs are used to transfer information between those facilities and Beverly and BEI at the Fort Smith headquarters. One is a long-term program (LTC) used for maintaining clinical records of residents. Another handles with accounts receivable. A third (business office) program includes an accounts payable element. The fourth (Kronos) is a labor management program which, among other things, allows associates to sweep their badges through a timeclock. It also generates punch detail time records.

The decision to use these computer systems was a corporate one, and personnel at that level coordinated installation of the systems and related training programs. Implementation involved support personnel from related disciplines, e.g., nursing associates helped implement LTC, while financial personnel worked with the Kronos system. Administrators had no discretion as to whether or not to utilize the programs.

In the area of general (noncomputerized) communications, there are numerous examples of a regular flow of information from the nursing homes to the corporate level, e.g., weekly "key factors" reports which include data on inquiries, admissions, average daily census, hours worked by licensed nurses and aides employed from a registry, overtime costs, average hours worked daily, collection percentages, and the number accidents entailing lost time by associates. The reports are transmitted by administrators to their respective directors who use them in preparing consolidated key factor reports for facilities in their areas. Those reports are passed on to appropriate VPOs who, in turn, generate consolidated regional reports, which they forward to corporate headquarters.

Other types of information transmitted by the facilities to upper management include: a daily census, biweekly payroll data, and weekly reports on rehab and skin conditions. Monthly reports on facility status are sent to directors of operations and nurse consultants.

Other often used upward channels of information are reports of periodic meetings and telephone conferences held among the various levels of the corporate hierarchy. Some group meetings are nationwide in scope, others regionwide, and still others areawide.

Documents relating to these meetings and conference calls show that even though there was no direct line authority between certain levels in the corporate hierarchy, direct communication between all levels was common. For example, vice president of labor and employment (Donald Dotson), regularly participated at meetings of regional directors of associate Relations and often was party to telephone conference calls with the regional directors. These meetings and telephone conferences often were used to communicate corporate policy.

Intracorporate communication also took the form of corporate publications, at least four of which are circulated nationwide. One is a newsletter ("Bev Cares") sent to all associates. Another newsletter ("Inner Circle") is distributed weekly to all administrators and facility managers. Third is "Physicians Update," a newsletter distributed periodically to all facility medical directors. Finally, there is a Beverly Enterprises Weekly Labor and Employment Report distributed to VPOs and regional directors of associate relations.14

In addition to those publications, newsletters are generated by and circulated in regions. For example, "Rehab Focus" is a newsletter distributed quarterly within Region 1; and a similar publication ("CNA News and Views") is distributed in Region 2 to all certified nurses aides on a periodic basis.15

BEI also has a media specialist (Neil Gulsvig) at the corporate level who reports directly to CEO Banks. Among other things, he coordinates company response to media inquiries and monitors relations between administrators and the media. To this end, administrators are required to report all media inquiries to Gulsvig and he provides them with general guidelines for dealing with the inquiries as well as specific "talking points" or suggested answers for use in interviews. In addition, he drafts letters to the media for them to sign and send.

J. Marketing and Sales

Also reporting to COO Hendrickson is a corporate department (Marketing and Sales), which, in turn, receives reports from directors of sales and marketing in the regions. Reporting to them are nursing home administrators and account executives.

Various marketing strategies are employed. One program is the family and friends survey, which is conducted on an annual basis nationwide. In 1996, over 78,000 surveys were sent to families and friends of residents. Results were complied on a corporate, regional, area, State, and facility basis. Results of the surveys were cited in promotional materials as indicative of customer satisfaction. Other results were used to identify deficiencies at individual facilities and formed the basis for corrective plans of action. For example, a corporate associate relations representative urged that an administrator at a particular facility make rounds every day at 11 a.m., that supervisors get involved with the feeding program, and that CNAs not leave the building until their replacements arrive.16

Other marketing-type programs implemented on a nationwide basis are Magical Moments and Share the Spirit. Also, within certain regions, there is also a Beverly Gold card available to associates and family members which offers discounts from participating businesses. Another marketing tool is a corporatewide census contest for all administrators. Winners receive cash awards and overall winners have been invited to attend a Super Bowl party at the home of COO Hendrickson.

As with other aspects of Beverly's operations, there is close corporate monitoring of the manner in which facilities implement the various marketing strategies. For example, an associate at the Ft. Smith headquarters anonymously made random calls to nursing homes asking for information about nationally advertised programs (Medicare Marketing Roll-Out and Military Hiring). When he reported to Beverly's then-President Hendrickson that responsible associates at two facilities had never heard of those programs, the latter promptly communicated his displeasure to the appropriate regional director who, in turn, sent a blistering letter to his administrators, the concluding portion of which reads as follows:

> Make sure you are aware of these two programs and that your associates (DON and Social Worker) are aware of the ins and outs of them also. I cannot emphasize this enough, as we feel quite sure that this will not be the last random call and failure on your part to have this knowledge could be a *costly error!*
>
> *Educate your associates IMMEDIATELY!!* [Emphasis in original.]

Corporate oversight of the facilities' marketing efforts included monitoring the average daily census for each facility.17 If an individual facility had a low census, specific controls were implemented, e.g., requiring the administrator to complete a form detailing lost revenue opportunities, availability inquiries received, circumstances of discharges, and prior and planned marketing activity. The form had to be signed by the administrator as well as by his department heads.

In order to standardize the monitoring of facilities' implementation of sales strategies, Beverly established comprehensive sales criteria. It also employed a firm to "mystery shop" nursing homes. Employees of the firm, after making anonymous telephone calls to and tours of nursing homes, and wrote and forwarded evaluations to directors of operations.

In addition to its marketing activities, Beverly has contracts with a number referral sources, including the Veterans Administration, commercial insurers, and managed care organizations. Available also is a BEI owned insurance verification and referral network which assists the facilities in investigating patient eligibility and benefit plans and activating the case management process. Standardized admissions agreements are used at all facilities.

K. Finance

BEI also has a corporate finance department, which reports to CEO Banks. Within that department are several sections each handling specialized financial matters, including payroll, internal audit, tax, and risk management.18 The payroll office handles the payroll for the entire corporation organization using data from the Kronos time management system described above. The corporate payroll department transmits paychecks to the facilities for distribution. All paychecks bear the name Beverly Health and Rehabilitation Services, Inc.

There is also a corporate Medicare unit staffed by a compliance nurse, a claims supervisor as well as claims and documentation analysts with responsibility for particular regions. In addition, there are one or two Medicare specialists assigned to each region who work in the field. The senior manager of Medicare training (who reports to the vice president of nursing) maintains regular contact with the Medicare specialists by memorandum and by periodic training sessions. This unit prepares all claims for Medicare reimbursement based on resident information entered by the facilities into the computer system. Payment is made directly to the Medicare unit. In addition, it compiles data on trends in Medicare occupancy rates for all nursing homes for senior corporate staff, such as COO Hendrickson and Vice President of Nursing Hendrick, as well as to the VPOs.

In addition to the Medicare unit, is a corporate level Managed Care Network having case managers, each of whom is responsible for overseeing particular groups of nursing homes. The network verifies insurance coverage, provides cost analysis on admissions, negotiates per diem, and performs other related services. Case managers are responsible for overseeing implementation of policies contained in a comprehensive manual entitled "Beverly Case Management System."

All information related to billings on resident accounts is transmitted from individual facilities to corporate headquarters, and all resident accounts are billed from there. Payments on resident accounts received at nursing homes are promptly transmitted to corporate headquarters.

At the direction of the corporate finance department, each nursing home maintains two bank accounts: a depository account and a patient trust account. Although the depository account is in the name of the facility, the address of the account is listed as corporate headquarters and four corporate officers are identified as signatories.

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[14] Distribution was to the human resources personnel, including those in Beverly sister companies.

[15] The latter newsletter is circulated to regional directors of resident care services around the country (copy to Beverly President Mathies) by Vice President of Nursing Clare Hendrick.

[16] In addition to surveying family and friends on an annual basis, Beverly also surveyed its associates nationwide on an annual basis regarding levels of satisfaction and opinions.

[17] As discussed supra, average daily census was one of the key factors monitored on a weekly basis.

[18] There are also other special purpose legal entities such as the Beverly Funding Corporation, which was created to refinance corporate debt.

A section in the finance department (internal audit) performs random audits at nursing homes, sometimes spending as much as 2 weeks at a time monitoring, among other things, wage and hour compliance, dues-deductions, and timeliness of invoice payments. Internal audits are also conducted on special occasions such as when an administrator leaves a facility.

In addition to "general" audits, VPOs and directors of operations closely monitor collection of accounts receivables by the facilities. For example, on April 29, 1996, VPO Lee wrote to administrators within Region 1 expressing his "alarm" at the upward trend in past due accounts at certain nursing homes.

Retention of records, both finance related and otherwise, is standardized throughout the Beverly complex.

The corporate finance department also has a tax section, which prepares and files one consolidated tax return for the Beverly complex. It also provides certain tax information directly to residents of the facilities and their families, informing them of the percentage of the room charge paid which represented medical care, which might be deductible from their taxes.

Another section within the corporate finance department (corporate risk management). obtains comprehensive insurance coverage for the nursing homes and also handles workers compensation matters for all Beverly Companies. It works closely with another section on safety and loss control.

L. Manuals and Forms

BEI has issued numerous comprehensive manuals dealing with a wide variety of matters, including associate relations, benefits administration, business office, code of ethics, corporate human relations, dietary, drug testing, outpatient department, recreation services, rehabilitation, and social services. Collectively, they govern performance of virtually every aspect of the operation of nursing homes. The manuals are listed in a large catalog. Single-spaced, the list takes up 3-1/2 pages.

The scope and mandatory nature of the manuals (even those not entitled "Policy and Procedure") is illustrated by the following extracts:

- "It is the Company policy that all Beverly nursing facilities use the central supply procedures described in this manual." [Central Supply System Manual];
- "We know the implementation of the manual is going to require extensive education and training as well as support from everyone. To make certain the transition goes smoothly, we have developed a roll-out schedule that coordinates with the '94 menu schedule." [Cover letter from Corporate Director of Dietary Services accompanying distribution of the Diet Manual];
- "This manual is designed to be a comprehensive guide for the training and orientation of the proper techniques, procedures, and services provided by the Laundry Departments of Beverly Enterprises, Inc." (Cover letter from then Executive Vice President of Operations Hendrickson accompanying the Laundry Manual;
- "This manual is designed to be a comprehensive guide for the training and orientation of the proper techniques, procedures, and services provided by the Housekeeping Departments of Beverly Enterprises, Inc." [Cover letter from then Executive Vice President of Operations Hendrickson accompanying the Housekeeping Manual];
- "The P.M. program is *NOT* a reference manual designed to be put on the shelf for occasional review. The entire manual *IS* a complete working program with work sheets/logs and a calendar [emphasis in original]." [Preventive Maintenance Manual];
- "Follow the steps below when you receive your manuals. *All steps must be completed within 90 days of receipt* [emphasis in original]." [Infection Control Program Guidelines];

The Catalog also contains a single-spaced listing of all standardized forms. The list extends over 19 pages.

M. Nursing, Quality Assurance, and Rehabilitation

As vice president of nursing for BEI, Clare Hendrick maintains regular communications with directors of operations and directors of resident care services at the regional level, with nurse consultants in each area, and with administrators at the facility level.

Examples of her frequent written communications are: a memo dated June 17, 1994, regarding proper implementation of a new reporting system—resident assessment instrument (RAI); another dated October 4, 1995, wherein she instructs administrators on proper use of quality indicators; another dated March 7, 1996, in which she instructs directors of operations in regard to pressure sores as a key indicator of subpar care; and memos dated January 5 and 26, and March 14, 1996, updating regional directors of resident care services on, among other things, the Attends program and procedures to be followed in connection with State regulatory surveys.

In addition to the written communications, Hendrick also conducts periodic telephone conference calls and meetings with directors of resident care services and medicare specialists. In 1996, for example, she led four meetings with the directors of resident care services from various regions, each session took 1-1/2 to 2-1/2 days and representatives from related disciplines participated.

As reflected in Hendrick's activities, corporate monitoring of patient care at individual facilities was pervasive and continuing. Administrators were required to notify Hendrick and Beverly President Mathies immediately by voice mail whenever any adverse State action was impending or taken concerning substandard care. Further, a monthly action list was maintained in which facilities were classified as "watch" or "critical" based upon occurrence of certain events, such as the departure of an administrator or director of nursing, high turnover among CNAs or need for "Frequent consultation/Union activity."

Beverly also has a corporate quality assurance department headed by Gene Clarke, who reports both to COO Hendrickson and the BEI board of directors.

In general, before 1996, there were several different types of quality assurance reviews conducted by the quality assurance department: comprehensive, followup, consultative, and subacute. Each facility had a comprehensive quality assurance review annually. This review was a week in length and was conducted by quality assurance consultants in the areas of nursing, dietary and social work or recreation. The review included observation of the delivery of care, review of documentation and interviews with residents, facility associates, and family members. Facilities were scored in various categories, and if a facility scored below 90, it was directed to implement a corrective plan of action, and a followup review was thereafter conducted. Other quality assurance reviews were done on request (consultative) or for those facilities with subacute units. There were about 200 quality assurance consultants who, while working out of four field offices around the country, reported directly to the quality assurance department.

In an October 20, 1995, memo to Clarke, COO Hendrickson stated, "In order for the overall objective [reduction of the corporate budget] to be met, we need to reduce the size of the QM [Quality Management] budget by 3 million dollars." Hendrickson recommended that Clarke meet with Beverly President Mathies and Vice President of Nursing Hendrick and "take the leadership role in designing a new program."

Starting in 1996, a new approach, "total quality management" (TQM) and "continuous quality improvement" (CQI), was implemented at all of the business units of BEI, that is: Beverly, American Transitional Hospitals, Pharmacy Corporation of America, Spectra Rehab Alliance, Advinet, Hospice Preferred Choice, and Beverly Assisted Living. This was done "[recognizing that] while each line of business is somewhat unique, together they make up an integrated whole."

Under this approach, and with respect to Beverly, five quality indicators (QI) are monitored on a corporatewide basis: physical restraints, unplanned weight loss, antipsychotic drugs, medication errors, and acquired pressure sores. These indicators are monitored by each facility on a daily basis, and reported monthly to the nurse consultant. The nurse consultant then prepares a consolidated QI report for the area and submitted it to the director of resident care services. The latter then prepares a consolidated QI report for the region and submits it to the corporate quality assurance department. Thereafter, the corporate nursing department prepares a consolidated QI report for Beverly as a whole as well as on a regional basis. These Beverly-wide and regionwide reports are then sent to the regions and areas. If they QI reports reveal an incidence above a set norn, a corrective plan must be submitted. Under the newprograms, TQM associates are responsible for facilities within designated geographic areas, and they report directly to the corporate quality assurance department.

Individual facilities had no discretion to modify the QI programs.

N. Administrator-in-Training

Beverly also has an administrator-in-training (AIT) program conducted under the auspices of the regional associate relations departments. Under the program, a trainee spends several months working at a facility under the guidance of a preceptor gaining hands-on experience in all phases of facility operation. On conclusion of training, the successful graduate usually is made an administration in one of the nursing homes. At times, however, otherwise promising candidates fail to pass the Federal Nursing Home Administrator licensing examination. This prompted an area Beverley AIT committee member in the West Coast region to opine that

> the test is written as if the test-taker is an 'independent' administrator, as opposed to someone from a Beverly-type facility where there is general support from regional and corporate staff in areas like accounting. Possibly, our AITs approach the test differently from those who do not have a support system behind them and consequently must be well versed in all areas.

On being apprised of that concern, the regional director of human resources recommended regional level review of the AIT program with a view to broadening the scope of instruction given trainees. She did not mention any correlative broadening of responsibilities.

Because of its particular pertinence to this proceeding, realtionships within the Beverly corporate complex in regard to labor relations are considered under a separate heading.

II. LABOR RELATIONS

During the relevant time period, Donald Dotson held the position of vice president for labor and employment and reported to Boyd Hendrickson, COO of BEI. In that position, he provided numerous services and oversight of labor and employment issues to Beverly.

Dotson's responsibility encompasses developing and implementing corporate labor and employment policy, representing Beverly before labor and employment related Government agencies and with employer organizations. He also arranges for and directs management and supervisory training in regulatory compliance, supervisory skills, and other corporate-mandated labor and employment areas. In addition, he is responsible for oversight and management of all union-related activities such as union organizing, negotiations, administration of labor contracts, and Beverly's response to union corporate campaigns.

Dotson is a regular participant in weekly conference calls held by Beverly President Mathies with the VPOs. During the course of those calls, he reports on labor issues as they arise. Also, he regularly initiates conference calls with regional directors of associate relations which are specifically directed toward labor law and regulations. The importance of the latter, is highlighted in a memo dated May 4, 1995, sent to those directors (with copies to the Beverly president, VPOs directors of operations, and to corporate legal counsel) in which Dotson emphasized need for participation by all regions. Two weeks later in a memo to all VPOs then-President Hendrickson fully supported Dotson position. Regional directors of associate relations well understood their responsibility to keep Dotson fully informed.

A major area of Dotson's responsibilities includes development and implementation of various types of labor relations seminars for Beverly personnel around the country. At these seminars, often run in conjunction with the corporate law department, information is disseminated to the VPOs and the regional directors of associate relations, who are expected to disseminate it to managers and supervisors in their regions. In turn, the administrators are expected to implement the rules, policies and procedures discussed in the labor relations seminars. Speakers at the various seminars invariably include management personnel from the highest corporate levels. Example: Speakers at a seminar in June 1994 included Hendrickson Mike Flaherty (corporate legal department), Gene Clark (corporate vice president of quality assurance), and Neil Gulsvig (corporate communications). Gulsvig provided press kits and coordinated programs to be used to counteract union sponsored negative publicity.

A seminar on labor and employment law was held in many parts of the country in November 1994. Speakers included members of the corporate legal department as well as Hendrickson and Dotson. Attendees were reminded of "the Company's general policy that it would prefer to operate without a Union." They were told promptly to advise associate relations personnel if and when union buttons were worn at nursing homes. Also, they were given literature and forms intended to insure that charge nurses had authority sufficient to make them "supervisors" within the meaning of the Act. The packet concludes:

> Whether or not a charge nurse is considered a 'supervisor' is a very important issue. Management controls the evidence on this issue to a far greater degree than it does on most other labor employment law subjects. The materials that follow are designed to help managers insure the supervisory status of their charge nurses.

Seminars continue to be held in these and other labor-related areas; and at every seminar corporate officials disseminate associate relations policies with which every facility is expected to comply.

Other forms of corporate training in the labor relations area include a videotape on avoidance of unfair labor practices intended to be seen by every supervisory associate.

Another major area of labor relations overseen by Dotson is contract negotiation and administration. Regional directors of associate relations are required to give him advance notice of expiration dates in labor agreements and also provide their comments on anticipated issues in renewal negotiations; and during negotiations, they are required to maintain contact with their respective regional directors of associate relations for assistance, counsel, advice, and the presentation of uniform corporate responses.

Significant policy positions which might be incorporated into labor agreements are formulated and fully discussed at the corporate level. For example, the advisability of agreeing to union-security clauses during negotiations in 1996 was reserved for decision by a group composed of COO Hendrickson, Beverly President Mathies, Dotson, and VPOs whose regions were involved in the negotiations. Regional directors of associate relations were not participants.

Although nursing home administrators sometimes participate in negotiations affecting their facilities, they are not "spokespersons" for Beverly, that role usually is reserved for regional directors of associate relations acting in conjunction with the corporate law department and Dotson.

Throughout the relevant period, Dotson required the regional directors of associate relations promptly to inform his office of the onset and progress of any union organizing activity.

For their part, VPOs were directed to report to corporate headquarters the results of every election within their areas of responsibility; and in instances where a union was voted in they were required to submit an analysis detailing why the associates felt a union was necessary to represent them. A similar explanation was required when top management learning about organizational activity only after a representation petition had been filed. These directives came from then-President Hendrickson who required that copies of each analysis be sent to Dotson.

Whenever a petition for representation is filed with the Board, regional directors of associate relations are given the following instruction:

> In order not to waste time or provide information that may be misused, we should not engage in protracted negotiations about stipulated elections. We should simply communicate our position to the NLRB without elaboration. If there is a possibility of an acceptable stipulation, our bargaining position is greatly improved if we are at the hearing prepared to proceed.

Related to the requirement to keep Dotson abreast of all union organizing and contract issues, is a directive that regional directors of associate relations fax him copies of any "10-day" notices regarding potential strike activity they might receive, as well as reports on leafleting and picketing activities.

Another example of close corporate involvement in how labor issues are handled at local levels is seen in an elaborate public relations "action plan" sent to all regional directors of associate relations in mid-April 1994 along with "media kits."[19] Prominent within the plan is a reemphasis of need for regional personnel to seek advice from corporate labor lawyers concerning procedures for dealing with union information requests, impending wage-hour audits, union organizing, upcoming contract negotiations, and disciplinary actions or changes in terms and conditions of employment proposed to be taken during an organizing campaign.

The degree of interrelation between corporate advice and local action in labor matters is illustrated by a memo from Dotson sent to the VPO for Region 1 (Claude Lee) in February 1996, just

[19] In addition to orchestrating regional and facility level responses to local media in regard to adverse union generated criticisms, corporate officials regularly urged regional directors of associate relations and their facility administrators to replicate and send to public officials model letters advocating or opposing labor legislation.

prior to the anticipated strike at the Pennsylvania nursing homes involved in this proceeding. After explaining the difference between economic and unfair labor practice strikes, he states:

> Given the unpredictability of the NLRB, the time it takes to litigate charges, and back pay liability for refusing to reinstate strikers who turn out to be "unfair labor practice" strikers, the decision to reinstate or not reinstate hinges on an assessment of the sustainability of the union's unfair labor practice charges and the potential back pay involved. . . . *We should consult about all actions which impact on the situation*, particularly those that could be unfair labor practices and accept the fact that many decisions will have to be made in the light of subsequent events and circumstances [emphasis added].

Beverly's procedure regarding labor relations matter are codified in section AR-305 of its associate relations manual which reads as follows:

A. The administrator [of a nursing home] will immediately advise [corporate] Associate Relations of any sign of union organizing activity.

B. The administrator shall not communicate or provide any information to representatives of the National Labor Relations Board (NLRB) except by direction of corporate labor counsel. If contacted by the NLRB, the administrator shall take the name, address, and phone number of the NLRB agent and inform the NLRB agent that she will be contacted by the company's counsel.

C. The administrator shall immediately notify Associate Relations of any contact by the NLRB or when there are questions about compliance with the Labor-Management Relations Act.

D. In those facilities where associates are represented by a union, management will strive to have a good working relationship with the union.

E. Contract negotiations and requests for information from the union shall be handled by the Regional Director of Associate Relations or her designee. Only the designated Associate Relations spokesperson can negotiate with the union.

With respect to contract negotiations, the record is replete with references to associate relations personnel being chosen to negotiate for facilities, and with corporate legal counsel being consulted with respect to negotiations. Keith Jewell, corporate legal counsel, conducted negotiations for facilities in the region 1 as well as for facilities in the Alabama area.

Nowhere does the record reflect administrators providing anything but background information on specific circumstances at a facility or perhaps knowledge of individual situations, which might need to be rectified in a new contract. Indeed, regional associate relations personnel can and do bypass administrators and receive financial information directly from facility financial personnel.

Illustrative is the contract renewal situation on this proceeding. In August 1995, approximately 8 months after contracts at 20 nursing homes had expired, Labor Relations Manager St. Cyr told administrators of the affected facilities to send written recommendations op proposed changes to him by September 15, 1995, so that Respondent could begin putting proposals together.

At the same time Regional Director for Associate Relations Wayne Chapman, after conferring with corporate legal and communications departments. created a "master" Pennsylvania Labor Relations Plan for negotiating renewal contracts on a facility by facility basis. Under the plan, experienced negotiators were to be drawn from several regional offices and given direct access to corporate officials, including Dotson and Chapman. The latter was to submit written summaries of proposals for each facility to the appropriate VPO Claude Lee and Dotson for approval prior to final negotiations. The role of facility administrators under the plan is purely informational, their primary role being conduits for corporate-generated community relations releases. Copies of the plan were sent to corporate counsel and Beverly President Mathies. The plan was implemented substantially as written.

Shortly thereafter, in response to a union information request filed on behalf of employees at all of the involved facilities, Chapman sent a copy of the request and a guidance sheet with instructions on who should collect what documents. As time went on, the requested information was sent to Chapman who, upon review and consultation with corporate legal, sent it to the negotiators for forwarding to the Union. Although administrators were notified of this activity, they had no part in determining information for release.

The question of whether and to what extent terms of expired contracts would be observed was answered by Chapman, again after consultation with corporate counsel and Dotson. For example, on December 15, 1995, he told Administrator Dan Landis, by telephone, what to do with respect to union dues, and specifically notified Landis that administrators did not need to notify the Union of a suspension or termination of an associate under an expired contract. He also informed administrators that there was no need to observe: (1) contractual provisions regarding access of the union business agents, (2) contractual provisions regarding union use of bulletin boards, and (3) union notification provisions in the event of layoffs or discipline.

Regarding grievances, administrators lacked authority: (1) to resolve them past the second step of the grievance procedure, (2) to approve settlements at the third step, (3) to waive contractual time limits for filing arbitrations, or (4) to agree to arbitrate any particular issue.

Following policy guidelines, administrators at the involved nursing homes took no independent action on information requests having to do with labor relations, except insofar as they were specifically instructed by their regional director of associate relations (Chapman), and the latter invariably acted only upon advice of corporate legal counsel. Union requests for information were complied with only through Chapman's office and only to the extent approved by corporate labor counsel.

When permitted under union contracts, management's ability to contract out unit work also was a matter beyond authority of administrators. For example, in such a situation Chapman was the deciding authority regarding facilities in Connecticut, and administrators were simply conduits for issuing an already prepared press notice. The same situation applies to matters such as proposed changes in disciplinary policy and facility access where decisions are made at corporate or regional level and administrators are used simply as channels for passing those decisions on to the union. Administrators might be asked for factual input relative to a potential workplace changes, but did not have and do not have the authority to process any change themselves.

Other miscellaneous issues handled at levels higher than administrators include discrepancies with respect to payment of union dues; notification to the union of suspensions or discharges; and compliance with Board orders.

High-level corporate officials also were involved even in minutiae relating to union matters. Thus, Regional Director Chapman kept Dotson informed with respect to an SEIU "ragsheet," and he also informed Dotson and corporate labor counsel with respect to an LPN's conversation with an NLRB agent in Pittsburgh.

Examples of corporate centralized control over compliance with other (non-NLRB administered) labor related State and Federal laws and regulations (and correlative lack of discretion at facility level) abound. In the area of affirmative action, for example, there is a corporate EEO coordinator who is responsible for overall implementation of and administration of affirmative action plans throughout the BEI complex. Administrators at any individual facility simply follow the detailed guidelines and submit the numerous forms provided from above. They have no authority to deviate. An essentially similar situation exists in regard to compliance with workplace laws and regulations within the scope of the Equal Economic Opportunity Commission, the Americans With Disabilities Act, the Service Members Occupational Conversion and Training Act, Wage and Hour laws, Workers' Compensation laws, and Occupational Safety and Health Administration regulations.

DISCUSSION AND CONCLUSIONS

I. SINGLE EMPLOYER STATUS

In determining whether related entities constitute a single employer, the Board looks to four principal factors: (1) common ownership or financial control; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations.[20] Further, the Board has long held that while no one factor is controlling, centralized control of labor relations is particularly significant in determining single-employer status.[21]

Common Ownership. In this case, common ownership is conceded in Beverly's answer to the amended complaint. Therein, it "admitted that BHR [Beverly Health and Rehabilitation Services,

[20] See *Radio & Television Broadcast Technicians, Local Union 1264 v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256 (1965), and cases cited therein; *Sakrete of Northern California v. NLRB*, 332 F.2d 902, 905–908 (9th Cir. 1964), enfg. 137 NLRB 1220 (1962).

[21] *Parklane Hosiery Co.,* 203 NLRB 597 (1973). See also *H. A. Green Decorating Co.,* 299 NLRB 157 (1990).

Inc.] and its nursing home operating regional offices, wholly-owned subsidiaries including BE-P [Beverly Enterprises-Pennsylvania, Inc.] and individual facilities have common officers, ownership and directors."

Common Management. As to common management, Beverly in its answer also admits having common directors and officers.

As to its management structure, Beverly's organizational charts show a top-down, hierarchical pyramid of the type common among other large organizations.

The hierarchy consists of all managerial and supervisory personnel, starting with BEI CEO Banks, extending down through BEI senior vice presidents and Beverly President Mathies, as well as other management personnel located in the corporate headquarters. It also includes Beverly VPOs and managers located in its various geographic regions throughout the country, and further extends down to directors of operations and managers within regions, and ultimately, includes nursing home administrators and, for some purposes also, directors of nursing at all of Beverly's individual facilities.

As shown by the employment history of many individuals, there has been a constant transfer and interchange of management and supervisory personnel throughout the Beverly complex. Transfers occur on the same level, as from one region to another, and also reflect movement up, or down, within the corporate structure, as from a regional position to a position in the corporate headquarters.22

In addition, it is clear that Beverly strives in a host of ways to ensure that common policies and practices are followed throughout its operations in all matters large and small. This is seen in a host of ways described above, including detailed level-by-level review of nursing home budgets, culminating in final approval BEI's board of directors, establishment and rigorous observance of standardized purchasing throughout the corporate complex, and from rigorous insistence on conformity to corporate standards in all areas of patient care.

Under this management system, administrators of individual nursing homes possess practically no discretion to act independently. In almost all matters affecting their facilities, they are required to observe policies established at higher levels and their performance is closely monitored by managers at the regional level who, in turn, carry out policies approved and overseen at ever higher levels.

As a result of these vertical and highly integrated operations, the scope and range of responsibilities exercised by Beverly administrators is relatively limited, as is evident from the following comment of a Beverly official on why promising administrator-in-training (AIT) candidates fail to pass the Federal Nursing Home Administrator licensing examination:

> the test is written as if the test-taker is an 'independent' administrator, as opposed to someone from a Beverly-type facility where there is general support from regional and corporate staff in areas like accounting. Possibl0y, our AITs approach the test differently from those who do not have a support system behind them and consequently must be well versed in all areas.

Apprised of that comment, a higher official recommended regional level review of the AIT program with a view to broadening the scope of instruction given trainees. She did not mention any correlative broadening of responsibilities.

In sum, I find common management throughout the Beverly complex.

Interrelation of Operations. Nationwide, Beverly's operations are shown to be thoroughly centralized and coordinated at the highest corporate level. All of the nursing homes are divided into the same departments, i.e., nursing, dietary, housekeeping, laundry, etc.; and the facilities are overseen by, and report upward through, the same chain of command.

As found in more detail above, matters dealing with the overall direction of Beverly's operations are decided at the Ft. Smith corporate level, with input from facility level personnel limited to providing data (and sometimes recommendations) used in corporate decision making.

Centralized Control of Labor Relations. The evidence amply demonstrates that in this area corporate headquarters at Ft. Smith maintains a highly integrated, centralized procedures under which all aspects of an associates' employment in the Beverly complex is established and closely controlled. Among other things:

- Corporate level personnel oversee all compliance with all federal and state labor related programs and requirements, and they perform all reporting functions.
- Managers and administrators at every level must adhere to policies contained in a comprehensive, corporately generated, manual governing personnel issues, including labor relations.
- Union activity of any kind, even down to the wearing of union buttons by nursing home personnel, must be promptly reported up the corporate chain.
- Reports containing a detailed analyzing what went "wrong or right" must be filed Regional VPOs whenever union elections are held.
- Once a facility becomes unionized, subsequent developments are closely monitored at the highest corporate level.
- Contract negotiators are designated by and report directly to Regional Directors who, in turn maintain constant communication with and directions from officials at the corporate level.

Based on the above, I conclude that Beverly is a single employer within the meaning of the Act.

II. REMEDY

A. Nationwide Order

In its brief, Beverly contends that no justification exists for extending the terms of a cease and desist order and notice posting requirement beyond any of the 20 facilities involved in this litigation. Accordingly, it argues that separate orders should be drawn up to address the unfair labor practices that allegedly occurred at each facility.

Implicit in that position is a claim that administrators at the respective nursing homes were responsible for the unlawful practices and acted without knowledge and approval of high authority.

I find the claim totally at odds with the evidence.

The role of facility administrations is shown to be severely circumscribed by corporate policies and oversight. They had virtually no discretion in many areas, particularly in matters involving union activity and responses thereto. In this respect, I find ample justification for, and again quote, a Beverly official's explanation of why otherwise promising candidates for the job of nursing home administrator fail to pass licensing examinations. The official states:

> the test is written as if the test-taker is an 'independent' administrator, as opposed to someone from a Beverly-type facility where there is general support from regional and corporate staff in areas like accounting. Possibly, our AITs approach the test differently from those who do not have a support system behind them and consequently must be well versed in all areas.

Indeed, in almost every instance where unfair labor practices are found herein Beverly officials above the facility level were either directly involved or, having knowledge of what was happening, took no steps to avert violations.

For example, the record shows that Beverly's region 1 director for associate relations (Wayne Chapman) ordered many of the violative actions found in this case. His immediate subordinate, Labor Relations Manager Ron St. Cyr directed others. Further, they did not act independently. On the contrary, their actions were directed by or taken with knowledge and approval of Vice President for Labor and Employment Donald Dotson, Beverly President Bill Mathies, VPO Claude Lee, and corporate legal counsel.

In light of the above, I conclude that the remedial purposes of the Act would not be served by individual orders each tailored to violations committed at each nursing home. Having been corporately orchestrated a broader remedy is necessary, one which takes into account that the violations collectively reflect a deep seated corporate level antiunion animus and

> abiding determination to demonstrate to employees, both members of the Local Unions and prospective members, the futility of recourse to unionization and its concomitant need to bargain collectively; and in pursuing that objective [Beverly was] . . . more than willing to and frequently did resort to unlawful means. [JD slip op. at 39.]

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[22] See *Soule Glass & Glazing Co.,* 246 NLRB 792 (1979), enfd. 652 F.2d 1055 (1st Cir. 1981), where "common flow of management personnel from one corporation to another" is found indicative of single-employeer status.

Should a single nationwide remedial order be issued?

I conclude that such an order is clearly warranted having in mind that Beverly's animus towards unions and efforts to defeat employees' protected right to organize is not confined to the particular facilities and area involved in this proceeding but extends nationwide.

In that regard, the instant proceeding is preceded by a plethora of Board cases in which host of unfair labor practices were found to have been committed at Beverly owned or controlled nursing homes. These include:

- At least 11 separate cases decided between 1979 and 1987 involving 10 facilities in 9 States (Michigan, California, Pennsylvania, Alabama, Maryland, Hawaii, Arkansas, Iowa, and Indiana).23;
- *Beverly I,* a consolidated case decided in 1993 involving approximately 134 violations at 33 facilities in 12 States (Pennsylvania, Arkansas, Texas, Missouri, Washington, Michigan, Massachusetts, Connecticut, Indiana, Illinois, Minnesota, and Iowa).24
- *Beverly II,* another consolidated proceeding decided in 1998 involving approximately 78 violations at 18 facilities in 9 states (Texas, Indiana, Virginia, Pennsylvania, Connecticut, California, Minnesota, Wisconsin, and West Virginia).25
- *Beverly III,* still another consolidated case decided in 1998 involving approximately 28 violations at 9 facilities in 6 states (Pennsylvania, Connecticut, Florida, Illinois, Georgia, and Ohio).26
- Separate cases, 6 in number, decided between 1996 and 1998 involving 5 facilities in 4 States (Connecticut, California, Massachusetts, and Missouri).27

In *Beverly III* the Board issued a cease and desist order directed against Beverly nursing home operations nationwide. Here, evidence of continued interrelation between, indeed integration, of all Beverly operations and its propensity to violate the Act is much more detailed and compelling; and amply warrants a similar order.

In reaching this determination, I have considered and rejected an argument in Beverly's brief that a territorially comprehensive order is not needed because "there is absolutely no evidence that any facility in Region 1 or even all facilities in Pennsylvania, aside from the facilities involved in this litigation, are aware of or have been impacted by the alleged unfair labor practices in this case." Assuming its validity arguendo,28 a showing of a general lack of awareness on the part of employees that Beverly officials harbor antiunion animus and a proclivity to violate the Act is not necessary. The order herein will have the salutary purpose of informing them of such animus and proclivity and provide some assurance that their right to engage in concerted and union activity is protected under the Act.

B. Other Special Remedies

In my prior initial decision, and citing a seminal Board case,29 I observed that:

> Because of the Respondents' wide-ranging and persistent misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring them to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act.

The same conclusion is applicable here. Accordingly, a broad Order will be directed against Beverly.

The General Counsel also seeks an order order requiring Beverly to grant to all of the labor organizations which filed charges in the present case or in *Beverly I*, *Beverly II,* and *Beverly III* (the Charging Party Unions), on request: (1) reasonable access to bulletin boards and all places where notices to employees are customarily posted; (2) reasonable access to employees at its facilities in non-work areas during employees' nonworktime; and (3) notice of, and equal time and facilities for the Charging Party Unions to respond to any address made by Beverly to its employees at any location on the question of union representation; and (4) an order requiring Beverly to afford any labor organization, including the Charging Party Unions, the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which said labor organization is a participant; with all of these provisions to remain in effect for a period of 2 years from the date of Beverly's posting of any notice to employees required by the Board.

I am not persuaded that those extraordinary remedies are warranted at this time.

In addition, the General Counsel asks that Beverly be required to reimburse the the Board for all costs and expenses incurred in the investigation, preparation and presentation and conduct before the National Labor Relations Board and the courts of that portion of this case which relates to Beverly's status as a single employer within the meaning of the Act as alleged in paragraphs 4, 5, and 6 of the amended consolidated complaint issued on June 19, 1996. The basis for this request is that Beverly's denial and defense of this allegation is patently and meritless on its face.

In the seminal case dealing with reimbursement,30 the Board, after discussing pertinent cases, stated:

> Thus, those cases, when read together, indicated our intent to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in "clearly aggravated and pervasive misconduct" or in the "flagrant repetition of conduct previously found unlawful," where the defenses raised by that respondent are "debatable" rather than "frivolous."

In this case I find Beverly's defense in the matter of the single employer issue not to rise to the frivolous level. Accordingly, costs and expenses will not be assessed.

[Recommended Order omitted from publication.]

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[23] *Beverly Manor Convalescent Centers*, 242 NLRB 751 (1979), enf. denied and remanded 661 F.2d 1095 (6th Cir. 1981), reaffd. 264 NLRB 966 (1982), remanded 727 F.2d 591 (6th Cir. 1984), reaffd. 275 NLRB 943 (1985); *Beverly Manor Convalescent Hospital*, 250 NLRB 355 (1980); *Hillview Convalescent Center*, 266 NLRB 758 (1983); *Beverly Enterprises*, 272 NLRB 83 (1984); *Cumberland Nursing Center*, 263 NLRB 428 (1982); *Hale Nani Health Center*, 279 NLRB 242 (1986); *Leisure Lodge*, 279 NLRB 327 (1986); *Parkview Gardens Care Center*, 280 NLRB 47 (1986); *Fountainview Place*, 281 NLRB 26 (1986); *Provincial House Living Center*, 287 NLRB 158 (1987); and *Beverly Manor of Monroeville*, 286 NLRB 1084 (1987).

[24] *Beverly Enterprises,* 310 NLRB 222 (1993).

[25] *Beverly California Corp.*, 326 NLRB 153 (1998).

[26] *Beverly California Corp.,* 326 NLRB 232 (1998).

[27] *Greenwood Health Center*, 322 NLRB 334 (1996), enf denied 139 F.3d 135 (2d Cir. 1998); *Beverly Health Care Center*, 322 NLRB 881 (1997); *Beverly Manor San Francisco*, 322 NLRB 968 (1997), enfd. 152 F 3d 928 (9th Cir. 1998); *Beverly Manor Nursing Home*, 325 NLRB 598 (1998), enfd. 174 F.3d 13 (1st Cir. 1999); *Beverly Manor Nursing Home*, 328 NLRB 744 (1999); and *New Madrid Nursing Center,* 325 NLRB 166 (1998).

[28] The argument would have me put on blinders toward violations at other facilities around the country. It also implies that Beverly employees are media blind and are not aware that the Company is apprehensive about and closely monitors any sign of union activity at nursing homes throughout the country.

[29] *Hickmott Foods*, 242 NLRB 1357 (1979).

[30] *Heck's Inc*., 215 NLRB 765, 767 (1974).